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II. TO WHOM GRANTED.

3. Order in which persons entitled. Letters of administration, in case of intestacy, shall be granted to the persons entitled thereto and applying for the same, in the following order:

1. To the husband or widow, except as hereinafter provided.
2. To the next of kin in the order of their degree, where they are of different degrees; if of equal degree, to one or more of them, at the discretion of the clerk.
3. To the most competent creditor who resides within the state, and proves his debt on oath before the clerk.
4. To any other person legally competent.

Code, s. 1376; C. C. P., s. 456; R. C., c. 46, ss. 2, 3; 1868-9, c. 113, s. 115.

4. Husband, on wife's estate; his interest therein. If any married woman shall die wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate, and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband shall die after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as provided by law.

Code, s. 1479; 1871-2, c. 193, s. 32.

5. Disqualifications. The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify—

1. Is under the age of twenty-one years.
2. Is a nonresident of this state; but a nonresident may qualify as executor.
3. Has been convicted of an infamous crime.
4. Is adjudged by the clerk incompetent to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding.
5. Fails to take the oath or give the bond required by law.
6. Has renounced his right to qualify.

Code, s. 1377; C. C. P., s. 457.

6. When disqualified persons entitled. Where an executor named in the will, or any person having a prior right to administer, is under the disqualification of non-age, or is temporarily absent from the state, such person is entitled to six months, after coming of age or after his return to the state, in which to make application for letters testamentary, or letters of administration.

Code, ss. 1379, 2165; C. C. P., ss. 452, 460; R. C., c. 46, s. 12.

7. Forfeiture by divorce or murder. When a marriage shall be dissolved a vinculo, the parties respectively, or when either party shall be convicted of murder of the other, or of being accessory before the fact of such murder, the party so convicted shall thereby lose all his or her right to administer on the estate of the other, and to a distributive share in the personal property of the other, and every right and estate in the personal estate of the other.

Code, s. 1480; 1889, c. 499; 1871-2, c. 193, s. 42.

8. Elopement and adultery of wife forfeits right. If any married woman shall elope with an adulterer, and shall not be living with her husband at his death, she shall thereby lose all right to a distributive share in the personal property of her husband, and all right to administer on his estate.

Code, s. 1481; 1871-2, c. 193, s. 44.

9. How husband forfeits right as to wife's estate. If any husband shall separate himself from his wife, and be living in adultery at her death, or if she shall have obtained a divorce a mensa et thoro, and shall not be living with her husband at her death, or if the husband shall have abandoned his wife, or shall have maliciously turned her out of doors, and shall not be living with her at her death, he shall thereby lose all his right and estate of whatever character in and to her personal property, and all right to administer on her estate.

Code, s. 1482; 1871-2, c. 193, s. 45.

10. Executor may renounce. Any person appointed an executor may renounce the office by a writing signed by him, and on the same being acknowledged or proved to the satisfaction of the clerk of the superior court, it shall be filed.

Code, s. 2163; C. C. P., s. 450.

11. When renunciation required. When any person applies for administration, and any other person has prior right thereto, a written renunciation of the person or persons having such prior right must be produced and filed with the clerk.

Code, s. 1378; C. C. P., s. 459.

12. When person entitled deemed to have renounced. If any person, entitled to letters of administration, fails or refuses to apply for such letters within thirty days after the death of the intestate, the clerk, on application of any party interested, shall issue a citation to such person to show cause, within twenty days after service of the citation, why he should not be deemed to have renounced. If, within the time named in the citation, he neglects

to answer or to show cause, he shall be deemed to have renounced his right to administer, and the clerk must enter an order accordingly, and proceed to grant letters to some other person.

Code, s. 1380; C. C. P., s. 460 (a); 1868-9, c. 203.

13. When executor deemed to have renounced. If any person appointed an executor does not qualify or renounce within sixty days after the will is admitted to probate, the clerk of the superior court, on the application of any other executor named in the same will, or any party interested, shall issue a citation to such person to show cause why he should not be deemed to have renounced. If, upon service of the citation, he does not qualify or renounce within such time, not exceeding thirty days, as is allowed in the citation, an order must be entered by the clerk decreeing that such person has renounced his appointment as executor.

Code, s. 2164; C. C. P., s. 451.

III. WILL ANNEXED.

14. Letters with, issued when. If there is no executor appointed in the will, or if, at any time, by reason of death, incompetency adjudged by the clerk of the superior court, renunciation, actual or decreed, or removal by order of the court, or on any other account there is no executor qualified to act, the clerk of the superior court may issue letters of administration with the will annexed, to some suitable person or persons, in the order prescribed in this chapter.

Code, s. 2166; C. C. P., s. 453.

15. Qualification of administrators with. Administrators with the will annexed shall have the same qualifications and give the same bond as other administrators.

Code, s. 2167; C. C. P., s. 454.

IV. JURISDICTION.

16. Of clerk of superior court. The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and letters of administration in cases of intestacy, in the following cases:

1. Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened.

2. Where the decedent at his death had his fixed place of domi-

cil in more than one county, the clerk of any such county has jurisdiction.

3. Where the decedent, not being domiciled in this state, died out of the state, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk.

4. Where the decedent, not being domiciled in this state, died in the county of such clerk, leaving assets in the state, or assets of such decedent thereafter come into the state.

Code, s. 1374; C. C. P., s. 433; R. C., c. 46, s. 1; 1868-9, c. 113, s. 115.

17. What clerk has exclusive. The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent's estate.

Code, s. 1375; C. C. P., 434.

V. PUBLIC ADMINISTRATOR.

18. How appointed. There may be a public administrator in every county, appointed by the clerk of the superior court for the term of eight years.

Code, s. 1389; 1868-9, c. 113.

19. Takes and subscribes oath; gives bond. The public administrator shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties of his trust; and the oath so taken and subscribed must be filed in the office of the clerk of the superior court, and he must give the bond required by law.

Code, ss. 1393, 1390; 1868-9, c. 113, ss. 2, 5.

Note. For bond, see Bonds, s. 283.

20. When letters issue to. The public administrator shall apply for and obtain letters on the estates of deceased persons in the following cases:

1. When the period of six months has elapsed from the death of any decedent, and no letters testamentary, or letters of administration or collection, have been applied for and issued to any person.

2. When any stranger, or person without known heirs, shall die intestate in any county.

3. When any person entitled to administration shall request, in writing, the clerk to issue the letters to the public administrator.

Code, s. 1394; 1868-9, c. 113, s. 6.

21. Powers; duties; when term expires. The public administrator shall have, in respect to the several estates in his hands, all the rights and powers, and be subject to all the duties and lia-

bilities of other administrators. On the expiration of the term of office of a public administrator, or his resignation, he may continue to manage the several estates committed to him prior thereto until he shall have fully administered the same, if he shall then enter into a bond as required by law for administrators.

Code, s. 1395; 1868-9, c. 113, s. 7; 1876-7, c. 239.

VI. COLLECTORS.

22. When and how appointed. Whenever, for any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent.

Code, s. 1383; C. C. P., s. 463; R. C., c. 45, s. 9; 1868-9, c. 113, s. 115.

23. Qualification; bond. Every collector shall have the qualifications and give the bond prescribed by law for an administrator.

Code, s. 1384; C. C. P., s. 464.

24. Authority. Every collector has authority to collect the personal property, preserve and secure the same, and collect the debts and credits of the decedent, and for these purposes he may commence and maintain or defend suits, and he may sell, under the direction and order of the clerk, any personal property for the preservation and benefit of the estate. He may be sued for debts due by the decedent, and he may pay funeral expenses and other debts.

Code, s. 1385; C. C. P., s. 465; R. C., c. 46, s. 6; 1868-9, c. 113, s. 115.

25. Authority ceases, when; duty to account. When letters testamentary, letters of administration or letters of administration with the will annexed are granted, the powers of such collector shall cease, but any suit brought by the collector may be continued by his successor, the executor or the administrator in his own name. Such collector must, on demand, deliver to the executor or administrator all the property, rights and credits of the decedent under his control, and render an account, on oath, to the clerk of all his proceedings. Such delivery and account may be enforced by citation, order or attachment.

Code, s. 1386; C. C. P., s. 466; R. C., c. 46, s. 7; 1868-9, c. 113, s. 115.

VII. APPLICATION FOR LETTERS.

26. What to contain. On application for letters of administration, the clerk must ascertain by affidavit of the applicant or otherwise:

1. The death of the decedent and his intestacy.
2. That the applicant is the proper person entitled to administration, or that he applies after the renunciation of the person or persons so entitled.
3. The value and nature of the intestate's property, the names and residence of all parties entitled as heirs or distributees of the estate, if known, or that the same can not, on diligent inquiry, be procured; which of said parties are minors, and whether with or without guardians, and the names and residences of such guardians, if known. Such affidavit or other proof must be recorded and filed by the clerk.

Code, s. 1381; C. C. P., s. 461.

27. How contest over, instituted. Any person interested in the estate may, on complaint filed and notice to the applicant, contest the right of such applicant for letters of administration, and on any issue of fact joined, or matter of law arising on the pleadings, the cause may be transferred to the superior court for trial, or an appeal be taken, as in other special proceedings.

Code, s. 1382; C. C. P., s. 462.

28. Executor gives bond, when. Executors shall give bond as prescribed by law in the following cases:

1. Where the executor resides out of the state. And no foreign executor has any authority to intermeddle with the estate until he shall have entered into bond, which must be done within the space of one year after the death of the testator, and not afterwards.
2. When a man marries a woman who is an executrix, and if the husband in such case fail to give bond, the clerk, on application of any creditor or other party interested in the estate, shall revoke the letters issued to the wife and grant administration with the will annexed to some other person.
3. Where an executor, other than such as may have already given bond, obtains an order to sell any portion of the real estate for the payment of debts, as hereinbefore provided, the court or clerk to whom application is made shall require, before granting any order of sale, such executor to enter into bond.

Code, s. 1515; 1868-9, c. 113, ss. 86, 115; R. C., c. 46, ss. 12, 13.

29. Oath taken; bond given. Before letters testamentary, letters of administration with the will annexed, letters of administra-

tion or letters of collection are issued to any person, he must give the bond required by law and must take and subscribe an oath or affirmation before the clerk that he will faithfully and honestly discharge the duties of his trust, which oath must be filed in the office of the clerk.

Code, ss. 1387, 1388, 2169; C. C. P., ss. 467, 468; 1870-71, c. 93.

Note. For bond, see Bonds, s. 282.

30. Persons injured may sue on bond. Every person injured by the breach of any bond given by an executor, administrator or collector, may put the same in suit and recover such damages as he may have sustained.

Code, s. 1516; 1868-9, c. 113, s. 87.

31. Letters revoked, bond liable to successor for default. Whenever the letters of an executor, administrator or collector are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the estate, and a recovery may be had thereon to the full extent of any damage, not exceeding the penalty of the bond, sustained by the estate of the decedent by the acts or omissions of such executor, administrator or collector, and to the full value of any property received and not duly administered. Moneys so recovered shall be assets in the hands of the person recovering them.

Code, s. 1517; 1868-9, c. 113, s. 88.

32. When new bond or new sureties required. If complaint be made on affidavit to the clerk of the superior court that the surety on any bond of an executor, administrator or collector is insufficient, or that one or more of such sureties is or is about to become a nonresident of this state, or that the bond is inadequate in amount, the clerk must issue an order requiring the principal in the bond to show cause why he should not give a new bond, or further surety, as the case may be. On the return of the order duly executed, if the objections in the complaint are found valid, the clerk shall make an order requiring the party to give further surety or a new bond in a larger amount within a reasonable time.

Code, s. 1518; 1868-9, c. 113, s. 89.

33. Remedy of surety in danger of loss. Any surety on the bond of an executor, administrator or collector, who is in danger of sustaining loss by his suretyship, may exhibit his petition on oath to the clerk of the superior court wherein the bond was given, setting forth particularly the circumstances of his case, and asking that such executor, administrator or collector be removed from office, or that he give security to indemnify the petitioner against

apprehended loss, or that the petitioner be released from responsibility on account of any future breach of the bond. The clerk shall issue a citation to the principal in the bond, requiring him, within ten days after service thereof, to answer the petition. If, upon the hearing of the case, the clerk deem the surety entitled to relief, he may grant the same in such manner and to such extent as may be just. And if the principal in the bond gives new or additional security, to the satisfaction of the clerk, within such reasonable time as may be required, the clerk may make an order releasing the surety from liability on the bond for any subsequent act, default or misconduct of the principal.

Code, s. 1519; 1868-9, c. 113, s. 90.

34. Failing to give new bond, letters revoked. If any person required to give a new bond, or further security, or security to indemnify, under the two preceding sections, fails to do so within the time specified in any such order, the clerk must forthwith revoke the letters issued to such person, whose right and authority, respecting the estate, shall thereupon cease.

Code, s. 1520; 1868-9, c. 113, s. 91.

35. Letters revoked; successor appointed; estate protected. In all cases of the revocation of letters, the clerk must immediately appoint some other person to succeed in the administration of the estate; and pending any suit or proceeding between parties respecting such revocation, the clerk is authorized to make such interlocutory order as, without injury to the rights and remedies of creditors, may tend to the better securing of the estate.

Code, s. 1521; 1868-9, c. 113, s. 92.

36. Form of letters. All letters must be issued in the name of the state, and tested in the name of the clerk of the superior court, signed by him, and sealed with his seal of office, and shall have attached thereto copies of sections forty-two and ninety-eight.

Code, ss. 1399, 2172; C. C. P., ss. 471, 478; 1871-2, c. 46.

VIII. REVOCATION.

37. On proof of will. If, after the letters of administration are issued, a will is subsequently proved and letters testamentary are issued thereon; or, if after letters testamentary are issued, a revocation of the will, or a subsequent testamentary paper revoking the appointment of executors is proved and letters are issued thereon, the clerk of the superior court must thereupon revoke the letters first issued, by an order in writing to be served on the person to

whom such first letters were issued; and, until service thereof, the acts of such person, done in good faith, are valid.

Code, s. 2170; C. C. P., s. 469.

38. For disqualification or default. If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit, that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in the due execution of his office, or that the issue of such letters was obtained by false representations made by such person, the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease.

Code, s. 2171; C. C. P., s. 470.

IX. ADVERTISEMENT FOR CREDITORS.

39. Advertisement for claims, when and how made; cost.

Every executor, administrator and collector, within twenty days after the granting of letters, shall notify all persons having claims against the decedent to exhibit the same to such executor, administrator or collector, at or before a day to be named in such notice; which day must be twelve months from the day of the first publication of such notice. The notice shall be published once a week for six weeks in a newspaper, if any there be published in the county. If there shall be no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county. The cost of publishing in a paper shall in no case exceed two dollars and fifty cents.

Code, ss. 1421, 1422; 1868-9, c. 113, s. 29; 1881, c. 278, s. 2.

40. How proved. A copy of the advertisement directed to be posted or published in pursuance of the preceding section with an affidavit, taken before some person authorized to administer oaths, of the proprietor, editor or foreman of the newspaper wherein the same appeared, to the effect that such notice was published for six weeks in said newspaper, or an affidavit stating that such notices were posted shall be filed in the office of the clerk by the executor, administrator or collector. The copy so verified or affidavit shall be deemed a record of the court and a copy thereof, duly certified by the clerk, shall be received as conclusive evidence of the fact of publication in all the courts of this state.

Code, s. 1423; 1868-9, c. 113, s. 31.

41. Notice may be served on creditor personally. The executor, administrator or collector may cause the notice to be personally served on any creditor, who shall, thereupon, within six months after personal service thereof, exhibit his claim, or be forever barred from maintaining any action thereon.

Code, s. 1424; 1868-9, c. 113, s. 32; 1885, 96.

X. INVENTORY.

42. Taken and returned within three months. Every executor, administrator and collector, within three months after his qualification, shall return to the clerk, on oath, a just, true and perfect inventory of all the real estate, goods and chattels of the deceased, which have come to his hands, or to the hands of any person for him, which inventory shall be signed by him and be recorded by the clerk. He shall also return to the clerk, on oath, within three months after each sale made by him, a full and itemized account thereof, which shall be signed by him and recorded by the clerk.

Code, s. 1396; R. C., c. 46, s. 16; 1868-9, c. 113, s. 8.

43. How compelled. If the inventory and account of sale specified in the preceding section are not returned as therein prescribed, the clerk must issue an order requiring the executor, administrator or collector to file the same within the time specified in the order, which shall not be less than twenty days, or to show cause why an attachment should not be issued against him. If, after due service of the order, the executor, administrator or collector does not, on the return day of the order, file such inventory or account of sale, or obtain further time to file the same, the clerk shall have power to vacate the office of administrator, executor or collector.

Code, s. 1397; 1868-9, c. 113, s. 9.

Note. For additional remedy, see Crimes.

44. New assets inventoried. Whenever further property of any kind, not included in any previous return, shall come to the hands or knowledge of any executor, administrator or collector, he must cause the same to be returned, as hereinbefore prescribed, within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as in the case of the first inventory.

Code, s. 1398; 1868-9, c. 113, s. 10.

XI. WHAT ARE ASSETS.

45. Distinction between legal and equitable abolished. The distinction between legal and equitable assets is abolished, and all

assets shall be applied in the discharge of debts in the manner prescribed by this chapter.

Code, s. 1406; 1868-9, c. 113, s. 14.

46. Trust estate in personalty. If any trustee, or any person interested in any trust estate, shall die leaving any equitable interest in personal estate which shall come to his executor, administrator or collector, the same estate shall be deemed personal assets.

Code, s. 1403; 1868-9, c. 113, s. 11.

47. Crops ungathered at death. The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the executor, administrator or collector, as part of the personal assets, and shall not pass to the widow with the land assigned as dower; nor to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will.

Code, s. 1407; 1868-9, c. 113, s. 15.

48. What proceeds of real estate deemed personal assets. All proceeds arising from the sale of real property, for the payment of debts, as hereinafter provided, shall be deemed personal assets in the hands of the executor, administrator or collector, and applied as though the same were the proceeds of personal estate.

Code, s. 1404; 1868-9, c. 113, s. 12.

49. What proceeds of real estate deemed real assets. All proceeds from the sale of real estate, as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid by the executor, administrator or collector to such persons as would have been entitled to the land had it not been sold.

Code, s. 1405; 1868-9, c. 113, s. 13.

50. Personalty fraudulently conveyed recovered. If there be not sufficient real and personal assets of the deceased to satisfy all the debts and liabilities of deceased, together with the costs and charges of administration, the personal representative shall have the right to sue for and recover any and all personal property which the deceased may in anywise have transferred or conveyed with intent to hinder, delay, or defraud his creditors, and any money or property so recovered shall constitute assets of the estate in the hands of the personal representative for the payment of debts. But if the fraudulent alienee of deceased has sold the property or estate so fraudulently acquired by him to a bona fide purchaser for value without notice of the fraud, then such fraudulent alienee shall be liable to the personal representative for the value of the property

and estate so acquired and disposed of. If the whole recovery from any fraudulent alienee of a decedent shall not be necessary for the payment of the debts of decedent and the costs and charges of administration of his estate, the surplus shall be returned to such fraudulent alienee or his assigns.

51. Debt of executor not discharged by appointment. The appointing of any person executor shall not be a discharge of any debt or demand due from such person to the testator.

Code, s. 1431; 1868-9, c. 113, s. 40.

52. Heirs jointly liable for debts, when. All persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest or distribution, shall be liable jointly, and not separately, for the debts of such decedent.

Code, s. 1528; 1868-9, c. 113, s. 99.

53. Limit of liability of heir. No person shall be liable, under the preceding section, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator or collector of the decedent, and it is incumbent on the creditor to show the matters herein required to render such person liable.

Code, s. 1529; 1868-9, c. 113, s. 100.

54. Recovery apportioned among heirs. In any such action the recovery must be apportioned in proportion to the assets or property received by each defendant, and judgment against each must be entered accordingly. Costs in such actions must be apportioned among the several defendants, in proportion to the amount of the recovery against each of them.

Code, s. 1530; 1868-9, c. 113, s. 101.

55. Priority of debts as affecting liability of heir. Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others.

Code, s. 1531; 1868-9, c. 113, s. 102.

56. Defense, other debts of equality or priority. The defendants in such action may show that there are unsatisfied debts of a prior class or of the same class with that in suit. If it appears that the value of the property acquired by them does not exceed the debts of a prior class, judgment must be rendered in their favor. If it appears that the value of the property acquired by them exceeds the amount of debts which are entitled to a prefer-

ence over the debt in suit, the whole amount which the plaintiff shall recover is only such a portion of the excess as is a just proportion to the other debts of the same class with that in suit.

Code, s. 1532; 1868-9, c. 113, s. 103.

57. Debts paid, estimated as unpaid in suit against heir, when.

If any debts of a prior class to that in which the suit is brought, or of the same class, has been paid by any defendant, the amount of the debts so paid shall be estimated, in ascertaining the amount to be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in the preceding section.

Code, s. 1533; 1868-9, c. 113, s. 104.

58. Contribution among devisees, where heir is liable. The remedy to compel contribution shall be by petition or action in the superior court or before the judge in term time against the personal representatives, devisees, legatees and heirs also of the decedent, if any part of the real estate be undevisee, within two years after probate of the will, and setting forth the facts which entitle the party to relief; and the costs shall be within the discretion of the court.

Code, s. 1534; 1868-9, c. 113, s. 106.

XII. WRONGFUL DEATH.

59. Action for wrongful death; recovery not assets. Whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amount in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

Code, ss. 1498, 1500; 1868-9, c. 113, ss. 70, 72, 115; R. C., c. 46, ss. 8, 9.

60. Measure of damages in wrongful death. The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death.

Code, s. 1499; 1868-9, c. 113, s. 71; R. C., c. 1, s. 10.

XIII. SALES OF PERSONALTY.

61. By collector, only on order of court. All sales of personal property by collectors shall be made only upon order obtained, by motion, from the clerk of the superior court, who shall specify in his order a descriptive list of the property to be sold.

Code, s. 1409; 1868-9, c. 113, s. 17.

62. As soon as practicable. Every executor and administrator shall have power in his discretion and without any order, except as hereinafter provided, to sell, as soon after his qualification as practicable, all the personal estate of his decedent.

Code, s. 1408; 1868-9, c. 113, s. 16.

63. Public, how made. All sales of personal estate by an executor, administrator or collector shall be publicly made, on credit or for cash, after twenty days' notification posted at the courthouse and four other public places in the county. When any person interested, either as creditor or legatee, on the day of sale objects to the completion of any sale on account of the insufficiency of the amount bid, title to such property shall not pass until the sale is reported to and confirmed by the clerk.

Code, ss. 1410, 1411; 1868-9, c. 113, ss. 18, 19.

64. Private, how made. When personal property shall consist of cotton, tobacco, goods, wares and merchandise; state, national or municipal bonds, or the stocks in incorporated companies, the executor or administrator may, upon application to the clerk of the superior court, obtain an order to sell and may sell such personal property at private sale for the best price that can be obtained, and shall report such sale to the clerk for confirmation.

1893, c. 346.

65. On credit; how proceeds secured. The proceeds of all sales of personal estate and rentings of real property by public auction or privately shall be secured by bond and good personal security; and such proceeds shall be collected as soon as practicable, otherwise the executor, administrator or collector shall be answerable for the same.

Code, s. 1413; 1893, c. 346, s. 2; 1868-9, c. 113, s. 21.

66. Public, hours of; penalty. All public sales or rentings provided for in this chapter shall be between the hours of ten o'clock a. m. and four o'clock p. m. of the day on which the sale or renting is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares and merchandise may be continued until the hour of ten o'clock p. m.; and every

executor, administrator or collector who otherwise makes any sale or renting shall forfeit and pay two hundred dollars to any person suing for the same.

Code, s. 1414; 1893, c. 346, s. 3; 1868-9, c. 113, s. 22.

67. Evidences of debt, when and how sold. Every executor, administrator and collector, at any time after one year from the grant of letters, shall be authorized to sell at public auction, in the manner prescribed in this chapter, all bills, bonds, notes, accounts, or other evidences of debt belonging to the decedent, which he has been unable to collect or which may be deemed insolvent. Before offering such evidences of debt at public sale he shall file with the clerk a descriptive list thereof, and obtain an order of sale therefor from the clerk, and shall make return of the proceeds of such sale as in other cases of assets.

Code, s. 1412; 1868-9, c. 113, s. 20.

XIV. SALES OF REALTY.

68. To pay debts when personality insufficient. When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent.

Code, s. 1436; 1868-9, c. 113, s. 42.

69. Undevised first sold. When any part of the real estate of the testator descends to his heirs by reason of its not being devised or disposed of by the will, such undevised real estate shall be first chargeable with payment of debts, in exoneration, as far as it will go, of the real estate that is devised, unless from the will it appears otherwise to be the wish of the testator.

Code, s. 1430; 1868-9, c. 113, s. 39.

70. Conveyances by heir within two years of letters. All conveyances of real property of any decedent made by any devisee or heir at law, within two years from the grant of letters, shall be void as to the creditors, executors, administrators and collectors of such decedent; but such conveyances to bona fide purchasers for value and without notice, if made after two years from the grant of letters, shall be valid even as against creditors.

Code, s. 1442; 1868-9, c. 113, s. 105.

71. Conveyed in fraud of creditors. The real estate subject to sale under this chapter shall include all the deceased may have

conveyed with intent to defraud his creditors, and all rights of entry and rights of action and all other rights and interests in lands, tenements and hereditaments which he may devise, or by law would descend to his heirs: Provided, that lands so fraudulently conveyed shall not be taken from any one who purchased them for a valuable consideration and without a knowledge of the fraud.

Code, s. 1446; 1868-9, c. 113, s. 51.

72. Fraudulent grantee, selling innocent purchaser, liable.

Whenever an executor, administrator or collector shall file his petition to sell land, which may have been fraudulently conveyed, and of which there may have been a subsequent bona fide sale, whereby he can not have a decree of sale of the land, the court may give judgment in favor of such executor, administrator or collector for the value of the land, against all persons who may have fraudulently purchased the same; and if the whole recovery shall not be necessary to pay the debts and charges, the residue shall be restored to the person of whom the recovery was made.

Code, s. 1447; 1868-9, c. 113, s. 52.

73. Heirs and devisees necessary parties to proceeding.

No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law.

Code, s. 1438; 1868-9, c. 113, s. 44.

74. Infants defend by guardian; must answer. Infant defendants must appear by guardian, either general or special, who shall file an answer to the petition, either admitting or denying the allegations thereof, and where such answer is filed by a guardian ad litem the costs and expenses thereof, if any, may be directed to be paid, if the court thinks proper, out of the proceeds of the sale, in case one is ordered.

Code, s. 1439; 1868-9, c. 113, s. 45.

75. Adverse claimant may be heard. Whenever the land, which is sought to be sold, is claimed by another person under any pretense whatsoever, such claimant shall be admitted to be heard as a party to the proceeding, upon affidavit of his claim, and if the issue be found for the petitioner he shall have his writ of possession and order of sale accordingly.

Code, s. 1441; 1868-9, c. 113, s. 47.

76. What petition for, must show. The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained:

1. The amount of debts outstanding against the estate.
2. The value of the personal estate, and the application thereof.
3. A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots.
4. The names, ages and residences, if known, of the devisees and heirs at law of the decedent.

Code, s. 1437; 1868-9, c. 113, s. 43.

77. Issue joined, cause transferred to term. When an issue of law or fact is joined between the parties, the course of the procedure shall be as prescribed in such cases for other special proceedings.

Code, s. 1440; 1868-9, c. 113, s. 46.

78. Petition not denied, order made. As soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegations in the petition are not denied or controverted, shall have power to hear the same summarily, and to decree a sale.

Code, s. 1443; 1868-9, c. 113, s. 48.

79. What order contains; what title made. The court may decree a sale of the whole or any specified parcel of the premises, in such a manner as to size of lots, place of sale, terms of credit, and security for payment of purchase money, as may be most advantageous to the estate, and upon the coming in of the report of the sale and the confirmation thereof, title shall be made by such person, and at such time as the court may prescribe, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession.

Code, s. 1444; 1868-9, c. 113, s. 49.

80. How advertised. Notice of sale under this proceeding shall be the same as for the sale of real estate by sheriffs on execution.

Code, s. 1445; 1868-9, c. 113, s. 50.

81. Lands devised to be sold by executor, who may sell. When any or all of the executors of a person making a will of lands to be sold by his executors shall die, fail or for any cause refuse to take upon them the administration; or after having qualified shall die, resign, or for any cause be removed from the position of executor; or when there is no executor named in a will devising lands to be sold, in every such case such executor or executors as survive or retain the burden of administration, or the administrator with

the will annexed, or the administrator de bonis non, may sell and convey such lands; and all such conveyances which have been or shall be made by such executors or administrators shall be effectual to convey the title to the purchaser of the estate so devised to be sold.

Code, s. 1493; 1889, c. 461.

82. Land sold by decedent, who makes deed. When any deceased person shall have bona fide sold any lands, and shall have given a bond or other written contract to the purchaser to convey the same, and the bond or other written contract hath been duly proved and registered in the county where the lands are situated, if within the state, or, if not in the state, shall be proved before the clerk of the superior court and registered in the county where the obligee lives or obligor died, his executor, administrator or collector may execute a deed to the purchaser conveying such estate as shall be specified in the bond or other written contract; and such deed shall convey the title as fully as if it had been executed by the deceased obligor: Provided, that no deed shall be made but upon payment of the price, if that be the condition of the bond or other written contract.

Code, s. 1492; 1868-9, c. 113, s. 65; 1874-5, c. 251.

83. Under will, may be public or private. Sales of real property made pursuant to authority given by will, unless the will otherwise directs, may be public or private, and on such terms as, in the opinion of the executor, are most advantageous to those interested therein.

Code, s. 1503; 1868-9, c. 113, s. 75.

84. Realty bought for estate, when. At any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, administrator or collector for the benefit of the estate, when, in his opinion, this is necessary to prevent a loss to the estate.

Code, s. 1505; 1868-9, c. 113, s. 77.

85. Specifically devised, devisee entitled to contribution. If, upon the hearing of any petition for the sale of real estate to pay debts, under this chapter, the court decree a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in respect to contribution among legatees. And the children and issue provided for in this chapter shall be regarded as specific devisees in such contribution.

Code, s. 1535; 1868-9, c. 113, s. 107.

XV. DEBTS PROVED AND PAID.

86. Order of payment. The debts of the decedent must be paid in the following order:

First class. Debts which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses.

Third class. Taxes assessed on the estate of the deceased previous to his death.

Fourth class. Dues to the United States and to the state of North Carolina.

Fifth class. Judgments of any court of competent jurisdiction within this state, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death.

Sixth class. Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year next preceding the death; or if such servant or laborer was employed for the year current at the decease, then from the time of such employment; for medical services within the twelve months preceding the decease.

Seventh class. All other debts and demands.

Code, s. 1416; 1868-9, c. 113, s. 24.

87. No preference in the class. No executor, administrator or collector shall give to any debt any preference whatever, either by paying it out of its class or by paying thereon more than a pro rata proportion in its class.

Code, ss. 1417, 1418; 1868-9, c. 113, ss. 25, 26.

88. Debts due executor not preferred. No property or assets of the decedent shall be retained by the executor, administrator or collector in satisfaction of his own debt, in preference to others of the same class; but such debt must be established upon the same proof and paid in like manner and order as required by law in case of other debts.

Code, s. 1420; 1868-9, c. 113, s. 28.

89. Debts not due, how paid. Debts not due may be paid on a rebate of interest thereon for the time unexpired.

Code, s. 1419; 1868-9, c. 113, s. 27.

90. Affidavit as to debt may be required. Upon any claim being presented against the estate, the executor, administrator or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been

made thereon, and that there are no offsets against the same, to the knowledge of the claimant; or if any payments have been made, or any offsets exist, their nature and amount must be stated in such affidavit.

Code, s. 1425; 1868-9, c. 113, s. 33.

91. Disputed debt may be referred. If the executor, administrator or collector doubts the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative. The same may be impeached in any proceeding against the personal representative for fraud therein: Provided, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it.

Code, s. 1426; 1868-9, c. 113, s. 34; 1872-3, c. 141.

92. Disputed debt not referred, barred in six months. If a claim is presented to and rejected by the executor, administrator or collector, and not referred as provided in the preceding section, the claimant must, within six months after due notice of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon.

Code, s. 1427; 1868-9, c. 113, s. 35.

93. Claims not presented in twelve months, administrator not liable. In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the executor, administrator or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator or collector.

Code, s. 1428; 1868-9, c. 113, s. 37.

94. No lien by suit against representative. No lien shall be created by the commencement of a suit against an executor, administrator or collector.

Code, s. 1432; 1868-9, c. 113, s. 41.

95. Payment of debts out of class, when valid. Where any executor or administrator has paid any debt of his testator or intes-

tate before all the debts of higher dignity have been paid and satisfied, and the estate of such testator or intestate was at the time of such payment solvent, but has since been rendered insolvent by the emancipation of the slaves, or the insolvency of the debtors of the estate, or other cause, without any fault or want of diligence on the part of the executor or administrator, or when any creditor has refused to accept payment of his debt in Confederate currency, and such currency was afterwards used by the executor or administrator in payment of debts of the estate, or it became of no value by the termination of the war, in all such cases payments thus made shall be deemed and held valid in law, and shall be allowed to such executor or administrator in all suits by creditors of the estate seeking to charge such executor or administrator with assets of the estate or with devastavit thereof without regard to the dignity of the debt thus paid, or on which such suit may be brought.

Code, s. 1496; 1869-70, c. 150.

96. Costs against executors, when allowed. No costs shall be recovered in any action against an executor, administrator or collector, unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy, in which cases the court may award such costs against the defendant personally, or against the estate, as may be just.

Code, s. 1429; 1868-9, c. 113, s. 38.

Note. See Costs; see also, *infra* s. 113.

97. Bonds which bind heir. Bonds and other obligations in which the ancestor has bound his heirs shall not be put in suit against the heirs or devisees of the deceased, but shall be paid as other debts of the same class in the manner provided in this chapter.

Code, s. 1404; 1868-9, c. 113, s. 12.

XVI. ACCOUNTS.

98. Annual. Every executor, administrator and collector shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and, having carefully revised and audited such account, if he approve the same he must

endorse his approval thereon, which shall be deemed prima facie evidence of correctness.

Code, s. 1399; C. C. P., s. 478; 1871-2, c. 46.

99. Failure to file, how compelled. If any executor, administrator or collector omits to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fail to appear or refuse to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office.

Code, s. 1400; C. C. P., s. 479.

100. Vouchers presumptive evidence. Vouchers are presumptive evidence of disbursement, without other proof, unless impeached. If lost, the accounting party must, if required, make oath to that fact, setting forth the manner of loss, and state the contents and purport of the voucher. And this section shall apply to guardians, collectors, trustees and to all other persons acting in a fiduciary character.

Code, s. 1401; C. C. P., s. 480.

101. Final account. An executor or administrator may be required to file his final account for settlement in the office of the clerk of the superior court by a citation directed to him, at any time after two years from his qualification, at the instance of any person interested in the estate; but such account may be filed voluntarily at any time; and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk.

Code, s. 1402; C. C. P., s. 481.

XVII. ACCOUNTING COMPELLED.

102. By special proceeding by creditor. Any creditor of a deceased person may, within the times prescribed by law, prosecute a special proceeding or a civil action before the judge in his own name and in behalf of himself and all other creditors of the deceased without naming them, against the personal representative of the deceased, to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively.

Code, s. 1448; 1871-2, c. 213; 1876-7, c. 241, s. 6.

103. What rules govern. The said special proceeding shall be governed by the rules of practice prescribed for special proceedings, except so far as the same are modified by this chapter.

Code, s. 1449; 1871-2, c. 213, s. 2.

104. When and where summons returnable. The summons in said special proceeding shall be returnable before the clerk of the superior court of the county in which letters testamentary or of administration were granted, and on a day not less than forty nor more than one hundred days from the issuing thereof, and not less than twenty days after the service thereof.

Code, s. 1450; 1871-2, c. 213, s. 3.

105. Clerk to advertise for creditors, when. On issuing of the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims.

Code, s. 1451; 1871-2, c. 213, s. 4.

106. How advertisement published. The advertisement shall be published at least once a week for not less than four weeks in some newspaper which may be thought by the clerk the most likely to inform all the creditors, and shall also be posted at the courthouse door for not less than thirty days. If, however, the estate does not exceed three thousand dollars in value, and the creditors are supposed by the clerk all to reside within the county or to be known, publication in a newspaper may be omitted, and in lieu thereof the advertisement shall be posted at four public places in the county, besides the courthouse door. Proof of personal service on a creditor or that a copy of the advertisement was sent to him by mail at his usual address shall be as to him equivalent to publication.

Code, s. 1452; 1903, c. 134; 1871-2, c. 213, s. 5.

107. Creditors to file claims; appoint agent. The creditors of the deceased on or before the required day shall file with the clerk the evidences of their demands, and every creditor on filing such claim shall endorse thereon or otherwise name some person or place within the town in which the court is held, upon whom or where notices in the cause may be served or left, otherwise he shall be deemed to have notice of all motions, orders and proceedings in the cause filed or made in the clerk's office.

Code, s. 1453; 1871-2, c. 213, s. 6.

108. How claims proven. If the evidence of the demand be other than a judgment, or some writing signed by the deceased, it shall be accompanied by the oath of the creditor, or if he be non-

resident or infirm or absent, or in any other proper case, of some witness of the transaction, or of some agent of the creditor, that to the best of his knowledge and belief the claim is just, and that all due credits have been given.

Code, s. 1454; 1871-2, c. 213, s. 7.

109. Representative to file claims; notice to creditors. On the day of his appearance the personal representative shall on oath give to the clerk a list of all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants to the best of his knowledge and belief; and if any person so named shall have failed to file evidence of his claim, the clerk shall immediately cause a notice requiring him to do so to be served on him, which may be done by posting the same, directed to him at his usual address.

Code, s. 1455; 1871-2, c. 213, s. 8.

110. Clerk to exhibit claims to representative. On the day fixed for the appearance of the personal representative, the clerk shall exhibit to him a list of all the claims filed in his office with the evidences thereof.

Code, s. 1456; 1871-2, c. 213, s. 9.

111. Representative denying claim, notice to creditor. Within five days thereafter the defendant shall state in writing on said list, or on a separate paper, which of said claims he disputes in whole or in part. The clerk shall then notify the creditor, as above provided, that his claim is disputed, and the creditor shall thereupon file in the office of the clerk a complaint founded on his said claim, and the pleadings shall be as in other cases.

Code, s. 1457; 1871-2, c. 213, s. 10.

112. Issues joined, cause docketed for hearing. If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by the chapter on Civil Procedure in like cases. If the issues shall be of fact, the clerk shall send so much of the record as may be necessary to the next term of the superior court for trial.

Code, s. 1458; 1871-2, c. 213, s. 11.

113. Costs paid by representative personally, when. If any personal representative shall deny the liability of his deceased upon any claim evidenced as is provided in this chapter, and the issue shall finally be decided against him, the costs of the trial shall be paid by him personally, and not allowed out of the estate, unless

it shall appear that he had reasonable cause to contest the claim and did so bona fide.

Code, s. 1459; 1871-2, c. 213, s. 12.

Note. See s. 96.

114. Representative failing to appear, procedure. If the personal representative shall fail to appear on the return day, the clerk or judge of the superior court may permit him afterward to appear and plead on such terms as may be just.

Code, s. 1460; 1871-2, c. 213, s. 13.

115. Clerk to state an account. Immediately after the return day the clerk or judge shall proceed to hear such evidence as shall be brought before him, and to state an account of the dealings of the personal representative with the estate of his deceased according to the course of his court.

Code, s. 1461; 1871-2, c. 213, s. 14.

116. Account stated; examined; excepted to; signed. After the clerk shall have stated the account and prepared his report, he shall notify all the parties to examine and except to the same. Any party may then except to the same in whole or in part. The clerk shall then pass on the exceptions and prepare and sign his final report and judgment, of which the parties shall have notice.

Code, s. 1462; 1871-2, c. 213, s. 15.

117. Either party may appeal; security given for costs. Any party may appeal from a final judgment of the clerk to the judge of the superior court in term time, on giving an undertaking with surety, or making a deposit, to pay all costs which shall be recovered against him. If any creditor shall appeal and give such security, his appeal shall be deemed an appeal by all who are damaged by the judgment, and no other creditor shall be required to give any undertaking.

Code, s. 1464; 1871-2, c. 213, s. 17.

118. Papers filed; cause docketed for trial. On an appeal the clerk shall file his report and judgment and all the papers in his office as clerk of the superior court, and enter the case on his trial docket for the next term.

Code, s. 1465; 1871-2, c. 213, s. 18.

119. Certain creditors may docket judgments, when. If the exceptions and questions, from the decision on which the appeal is taken, affect only the creditors in one or more classes, the creditors in the prior classes by the leave of the clerk, or of the judge

of the superior court, may docket their judgments and issue execution thereon.

Code, s. 1466; 1871-2, c. 213, s. 19.

120. Judgment, if assets sufficient to pay a class. If upon taking the account it shall be admitted, or be found, without appeal, that the defendant has assets sufficient, after the deduction of all proper costs and charges, to pay all the claims which have been presented of any one or more of the classes, the clerk shall give judgment in favor of the creditors whose debts of such classes have been admitted, or adjudged by any competent court; and if any claim in any preferred class be in litigation, the amount of such claim, with the probable costs of the litigation, shall be left in the hands of the personal representative, and not carried to the credit of any subsequent class until the litigation is ended.

Code, s. 1467; 1871-2, c. 213, s. 20.

121. Judgment, if assets insufficient to pay a class. If the assets be insufficient to pay in full all the claims of any class, the amounts thereof having been found or admitted as aforesaid, the clerk may adjudge payment of a certain part of such claims, proportionate to the assets applicable to debts of that class.

Code, s. 1468; 1871-2, c. 213, s. 21.

122. What judgment contains; execution. All judgments given by a judge or clerk of the superior court against a personal representative for any claim against his deceased shall declare—

1. The certain amount of the creditor's demand.

2. The amount of assets which the personal representative has applicable to such demand. Execution may issue only for this last sum with interest and costs.

Code, s. 1469; 1871-2, c. 213, s. 22.

123. When judgment to fix with assets. No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative by pleading expressly admits assets.

Code, s. 1470; 1871-2, c. 213, s. 23.

124. Form and effect of execution. All executions issued upon the order or judgment of the judge or clerk or of any appellate court against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if

none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally.

Code, s. 1471; 1871-2, c. 213, s. 24.

125. Report evidence of assets only as of its date. The account and report and adjudication by the judge, clerk or any appellate court shall not be evidence as to the assets except on the day to which such adjudication relates.

Code, s. 1472; 1871-2, c. 213, s. 25.

126. Assets subsequent to report, how shown. Any creditor may afterwards, on filing an affidavit by himself or his agent that he believes that assets have come to the hands of the personal representative since that day, and on giving an undertaking, with surety, or making a deposit for the costs of the personal representative, may sue out a summons against him alleging subsequent assets, and the proceedings thereon shall be as hereinbefore prescribed, so far as the same may be necessary.

Code, s. 1473; 1871-2, c. 213, s. 26.

127. Suit for accounting or debt brought to term. In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the superior court at term time; and in all such cases it shall be competent for the court in which said actions shall be pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require.

Code, s. 1511; 1876-7, c. 241, s. 6.

128. Personal assets insufficient, land proceeded against. If it shall appear at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it shall be the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets.

Code, s. 1474; 1871-2, c. 213, s. 27.

129. Proceedings to sell real estate, how conducted. Upon the return of the summons the proceeding shall be as is directed in other like cases.

Code, s. 1475; 1871-2, c. 213, s. 28.

XVIII. DISTRIBUTION.

130. Order of distribution. The surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided:

1. If there are not more than two children, one-third part to the widow of the intestate, and all the residue by equal portions to and among the children of the intestate and such persons as legally represent such children as may then be dead.

2. If there are more than two children, then the widow shall share equally with all the children and be entitled to a child's part.

3. If there be no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them.

4. If there be no widow, the estate shall be distributed, by equal portions, among all the children, and such persons as legally represent such children as may be dead.

5. If there be neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and those who legally represent them.

6. If, after the death of the father and in the lifetime of the mother, any of his children shall die intestate, without wife or children, every brother or sister, and the representatives of them, shall have an equal share with the mother of the deceased child.

7. If there be no child nor legal representative of a deceased child nor any of the next of kin of the intestate, then the widow, if there be one, shall be entitled to all the personal estate of such intestate.

Code, s. 1478; 1893, c. 82; 1868-9, c. 113, s. 53.

Note. For distribution of recovery for wrongful death, see s. 59.

131. Advancements accounted for. Children who shall have any estate by the settlement of the intestate, or shall be advanced by him in his lifetime, shall account with each other for the same in the distribution of the estate in the manner as provided by the second rule in the chapter entitled Descents, and shall also account for the same to the widow of the intestate in ascertaining her child's part of the estate.

Code, s. 1483; 1868-9, c. 113, s. 54.

132. Children advanced to render schedule. Where any parent shall die intestate, who had in his or her lifetime given to, or

put in the actual possession of, any of his or her children, any personal property of what nature or kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime.

Code, s. 1484; 1868-9, c. 113, s. 55.

133. Children refusing to account for advances not to share.

In case any child who had, in the lifetime of the intestate, received a part of said estate, shall refuse to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share.

Code, s. 1485; 1868-9, c. 113, s. 56.

134. Illegitimate children next of kin to mother. Every illegitimate child of the mother dying intestate, or the issue of such illegitimate child deceased, shall be considered among her next of kin, and as such shall be entitled to a share of her personal estate as prescribed in this chapter.

Code, s. 1486; 1868-9, c. 113, s. 57.

135. Illegitimate children next of kin to each other. Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock.

Code, s. 1487; 1868-9, c. 113, s. 58.

XIX. AFTER-BORN CHILDREN.

136. Share in realty, in what allotted. The share of an after-born child in real estate shall be allotted to him out of any lands not devised, if there be enough for that purpose; and if there be none undevised, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up of the lands devised; and so much thereof shall be taken from the several devisees according to their respective values, as near as may be convenient, as will make the proper share of such child.

Code, s. 1536; 1868-9, c. 113, s. 108.

137. Share in personalty, in what allotted. The share of an after-born child in the personal estate shall be paid and delivered

to him out of any such estate not bequeathed, if there be enough for that purpose; and if there be none undisposed of, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up from the estate bequeathed; and so much shall be taken from the several legacies, according to their respective values, as will make the proper share of such child.

Code, s. 1537; 1868-9, c. 113, s. 109.

138. Share in personalty, when allotted in proceeds of realty.

If, after satisfaction of the child's share of real estate out of undevised lands, there be a surplus of such lands, and there be no personal estate undisposed of, or not enough to make up his share of such estate, then the surplus of undevised land, or as much as may be necessary, shall be sold and the proceeds applied to making up his share of personal estate. And if, after satisfaction of the child's share of personal estate out of property undisposed of by the will, there be a surplus of such property, then the surplus thereof shall be applied, as far as it will go, in exoneration of land, both devised and descended; and the same shall be set apart and secured as real estate to such child, if an infant non compos or feme covert.

Code, s. 1538; 1868-9, c. 113, s. 110.

139. Decree of contribution for share in realty, effect of. Upon the allotment to such child of any real estate in the manner aforesaid, he shall thenceforth be seized thereof in fee-simple; and the court shall give judgment severally, in favor of such of the devisees and legatees, of whose lands and legacies more has been taken away than in proportion to the respective values of said lands and legacies, against such of said devisees and legatees, of whose lands and legacies a just proportion has not been taken away, for such sums as will make the contribution on the part of each and every of them equitable, and in the ratio of the values of the several devises and legacies.

Code, s. 1539; 1868-9, c. 113, s. 111.

140. When deemed legatee or devisee. An after-born child after such decrees shall be considered and deemed in law a legatee and devisee as to his portion, shall be styled as such in all legal proceedings, and shall be liable to all the obligations and duties by law imposed on such: Provided, that all judgments or decrees bona fide obtained against the devisees and legatees previously to the preferring of any petition, and which were binding upon or ought to operate upon, the lands and chattels devised or bequeathed, shall be carried into execution and effect notwithstanding, and the petitioner shall take his portion completely subject thereto: Provided further, that any suit instituted against the devisees and legatees

previously to such petition shall not be abated or abatable thereby nor by the decree thereon, but shall go on as instituted, and the judgment and decree, unless obtained by collusion, be carried into execution; but on the filing of the petition, during the pendency of such suit, the petitioner, by guardian, if an infant, may become a defendant in the suit.

Code, s. 1540; 1868-9, c. 113, s. 112.

141. If no petition filed, how estate settled. In case no petition shall be filed within two years, as herein prescribed, the executor or administrator with the will annexed, before he shall pay or deliver the legacies in the will given, or before paying to the next of kin of the testator any residue undisposed of by the will, shall call upon the legatees, devisees, heirs and next of kin, and the said after-born child, by petition in the superior court, to litigate their respective claims, and shall pray the court to ascertain the share to which said child shall be entitled, and to apportion the shares and sums to which the legatees, devisees, heirs or next of kin shall severally contribute toward the share to be allotted to said child, and the court shall adjudge and decree accordingly.

Code, s. 1541; 1868-9, c. 113, s. 113.

XX. SETTLEMENT.

142. Legacies and distributive shares; how recovered. Legacies and distributive shares may be recovered from an executor, administrator or collector by petition preferred in the superior court, at any time after the lapse of two years from his qualification, unless the executor, administrator or collector shall sooner file his final account for settlement. The suit shall be commenced and the proceedings therein conducted as prescribed in other cases of special proceedings.

Code, s. 1510; 1868-9, c. 113, s. 83.

143. Distributive shares paid to clerk, when. It shall be competent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of clerk of the superior court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector and his sureties on his official bond to the extent of the amount so paid.

Code, s. 1543; 1881, c. 305, s. 1.

144. Clerk to give receipt under seal. It shall be the duty of the clerk, in the cases provided for in the preceding section, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office.

Code, s. 1544; 1881, c. 305, s. 3.

145. Must be made at end of two years. No executor, administrator or collector, after two years from his qualification, shall hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay; but all such estate so remaining shall, immediately after the expiration of two years, be divided and be delivered and paid to the person to whom the same may be due by law or the will of the deceased.

Code, s. 1488; 1868-9, c. 113, s. 59.

146. What may be retained. If, on a final accounting before the judge or clerk, it appears that any claim exists against the estate which is not due, or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained in the hands of the executor, administrator or collector, for the purpose of being applied to the payment when due or when recovered, with the expense of contesting the same. The order allowing such sum to be retained must specify the amount and nature of the claim.

Code, s. 1489; 1868-9, c. 113, s. 60.

147. Commissions allowed; proviso. The clerks of the superior court are authorized and directed to allow commissions to executors, administrators and collectors on filing their final accounts for settlement, not exceeding five per cent. upon the amount of receipts and expenditures, which shall appear to be fairly made in the course of administration; and such allowance may be retained out of the assets against creditors and all other persons claiming an interest in the estate. And the clerk, in making such allowance, shall consider the trouble and time expended in the management of the business: Provided, that in sales of land, for payment of debts, commissions shall not be allowed on any larger amount of the proceeds than the sum actually applied in payment of debts: Provided further, that nothing in this section contained shall prevent any executor, administrator or collector from retaining a reasonable sum for necessary charges and disbursements in the management of the estate. And any judge of the superior court or any commissioner appointed by said court to take and state an account of the assets of any deceased person in the hands of an executor, administrator or collector, upon any plea of fully administered, shall have power and be authorized

and directed to allow such executor, administrator or collector not exceeding five per cent. upon the amount of receipts and expenditures which shall appear upon the trial of said cause or taking of such account to have been fairly made in the course of administration.

Code, s. 1524; 1868-9, c. 113, s. 95; 1869-70, c. 189.

148. Petition may be filed for. An executor, administrator or collector, who has filed his final account for settlement, may, at any time thereafter, file his petition against the parties interested in the due administration of the estate, in the superior court of the county in which he qualified, or before the judge in term time, setting forth the facts, and praying for an account and settlement of the estate committed to his charge. The petition shall be proceeded on in the manner prescribed by law, and, at the final hearing thereof, the judge or clerk may make such order or decree in the premises as shall seem to be just and right.

Code, s. 1525; 1868-9, c. 113, s. 96.

149. Fund due absent party or infant without guardian paid to court; party not heard of in seven years, procedure. When any balance of money or other estate which is due an absent defendant or infant without guardian is found in the hands of an executor, administrator or collector who has preferred his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such absent person or infant. When the party entitled to the money has not been heard of for seven years or more the fund shall be distributed among the next of kin of the absent deceased person as prescribed by statute, in the following manner: An administrator shall be appointed and made a party to a special proceeding in which a verified petition shall be filed setting forth the facts, with names of the parties entitled, and such other evidence as may be required by the clerk in whose office said fund was deposited, and the proceedings conducted as other special proceedings; and the order disposing of the fund shall be approved and confirmed by the judge, either in term or at chambers.

Code, s. 1526; 1893, c. 317; 1868-9, c. 113, s. 97.

150. Liability and compensation of clerk. Every clerk of the superior court who may be intrusted with money or other estate in such case shall be liable on his official bond for the faithful discharge of the duties enjoined upon him by the judge in relation to said estate, and he may receive such compensation for his services as the judge may allow.

Code, s. 1527; 1868-9, c. 113, s. 98.

151. When paid to university. All sums of money, or other estate of whatever kind, which shall remain in the hands of any executor, administrator or collector for five years after his qualification, unrecovered or unreclaimed by suit, by creditors, next of kin, or others entitled thereto, shall be paid by the executor, administrator or collector to the trustees of the university of North Carolina; and the said trustees are authorized to demand, sue for, recover and collect such moneys or other estate of whatever kind, and hold the same without liability for profit or interest, until a just claim therefor shall be preferred by creditors, next of kin, or others entitled thereto; and if no such claim shall be preferred within ten years after such money or other estate be received by the said trustees, then the same shall be held by them absolutely.

Code, s. 1504; 1868-9, c. 113, s. 76.

152. Who parties to proceeding for settlement. In all actions and proceedings by administrators or executors for a final settlement of their estates and trusts, whether at the instance of distributees, legatees or creditors or of themselves, if the personal representative die or be removed pending such actions or proceedings, the administrator de bonis non or administrator with the will annexed, as the case may be, shall be made party as provided in other cases, or in such way as the court may order, and the action or proceeding shall be conducted to its end, and such judgment shall be rendered on the confirmation of the report, or upon the terms of settlement, if any shall be agreed upon by the parties, as will fully protect and discharge all parties to the record.

1893, c. 206.

153. Legacies ordered paid within two years, when. It shall be in the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court shall deem proper, when there shall be no necessity for retaining the fund.

Code, s. 1512.

XXI. ACTIONS BY AND AGAINST.

154. Right of action survives to, and against. Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate.

Code, s. 1490; 1868-9, c. 113, s. 63.

Note. For action for wrongful death, see s. 59.

155. Actions which do not survive. The following rights of action do not survive:

1. Causes of action for libel and for slander, except slander of title.

2. Causes of action for false imprisonment, assault and battery, or other injuries to the person, where such injury does not cause the death of the injured party.

3. Causes of action accruing against a husband by reason of his marriage, for the debts of the wife contracted by her before marriage.

4. Cases where the relief sought could not be enjoyed, or granting it would be nugatory, after death.

Code, s. 1491; 1868-9, c. 113, s. 64.

156. Right of action survives to successor. Executors and administrators, and executors of executors, shall have actions in like manner as the first testator or intestate might have had against any person, his executors and administrators, in all cases, except where such actions, being commenced, are not allowed by statute to be revived on the death of any party.

Code, s. 1497; 1868-9, c. 113, s. 69.

157. May maintain any appropriate action to recover assets. Executors, administrators or collectors may maintain any appropriate action or proceeding to recover assets, and to recover possession of the real property of which executors are authorized to take possession by will; and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent.

Code, s. 1501; 1868-9, c. 113, s. 73.

158. Must be in representative capacity. All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity.

Code, s. 1507; 1868-9, c. 113, s. 79.

159. Appearance by or service on one, binds all. In actions against several executors, administrators or collectors they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all.

Code, s. 1508; 1868-9, c. 113, s. 81.

160. Action against, when; execution issues, how. An action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due, but no execution shall issue against the executor, administrator or collector on a judgment therein against him without leave of the court, upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its ratable part, and such judgment shall be a lien on the property of the defendant only from the time of such leave granted.

Code, s. 1509; 1868-9, c. 113, s. 82.

161. Service by publication, when. Whenever process may issue against an executor who has not given bond, and the same can not be served upon him by reason of his absence or concealment, service of such process may be made by publication in the manner prescribed in other civil actions.

Code, s. 1523; 1868-9, c. 113, s. 94.

162. Successor may issue execution, when. Any executor, administrator or collector may have execution issued on any judgment recovered by any person who preceded him in the administration of the estate, or by the decedent, in the same cases and the same manner as the original plaintiff might have done.

Code, s. 1513; 1868-9, c. 113, s. 84.

163. Letters revoked, action continues. In case the letters of an executor, administrator or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the administration of the estate, in the same manner as in case of death.

Code, s. 1514; 1868-9, c. 113, s. 85.

XXII. MISCELLANEOUS PROVISIONS.

164. How personal representatives hold. Every estate vested in executors, administrators or collectors, as such, shall be held by them in joint tenancy.

Code, s. 1502; 1868-9, c. 113, s. 74.

165. Personal representative liable. The executors and administrators of persons, who, as rightful executors or as executors in their own wrong, or as administrators, shall waste or convert to their own use any estate or assets of any person deceased, shall be charge-

165. ADMINISTRATION—XXII. *Miscel. Provisions.* Ch. 1

able in the same manner as their testator or intestate might have been.

Code, s. 1495; 1868-9, c. 113, s. 68.

166. Bona fide administration under act of 1868-9 validated.

If any person shall have bona fide administered any estate or any part of the estate of any deceased person whereof original administration was granted prior to the first day of July, under the said act of one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, he shall not be deemed guilty of a devastavit.

Code, s. 1434; 1869-70, c. 58, s. 2.

167. Time in which act to be done may be extended.

If no length of notice, or no time for the doing of an act, is stated in this chapter, the time shall be reasonable, and in any case it may be enlarged by the clerk from time to time, or by the judge of the superior court, on application to him or on appeal to him from the clerk.

Code, s. 1463; 1871-2, c. 213, s. 16.

168. Powers under will not affected; proviso. Nothing in this chapter shall be construed to affect the discretionary powers, trusts and authorities of an executor or other trustee acting under a will: Provided, creditors be not delayed thereby, nor the order changed in which by law they are entitled to be paid.

Code, s. 1415; 1868-9, c. 113, s. 23; R. C., c. 46, ss. 12, 13.

169. Causes transferred to superior court, when. All cases for the sale of real estate for assets heretofore in the county courts, in which final orders for collection and application or distribution of purchase money and making titles were not made before the adoption of the present constitution, may, at the instance of any person interested, be transferred, as other cases, to the superior court of the county where such proceeding was pending, and such court shall have full authority to make all necessary orders to complete the same.

Code, s. 1542; 1871-2, c. 161.

170. Estates prior to certain dates. This chapter shall apply to the estates of such deceased persons only whereof original administration has been granted subsequent to the first day of July, one thousand eight hundred and sixty-nine, and all estates whereon administration was granted prior to the said first day of July, one thousand eight hundred and sixty-nine shall be dealt with, administered and settled according to the law as it existed just prior to

said date, and it is hereby declared that such is the true intent and meaning of this chapter: Provided, that nothing herein shall be construed to prevent the application of this chapter so far as it relates only to the courts having jurisdiction of any action or proceeding for the settlement of an administration or to the practice and procedure therein.

Code, s. 1433; 1869-70, c. 58, s. 1.

171. To what estates this chapter applicable. This chapter shall apply only to cases where the grant of letters of collection or of probate or of administration shall have issued on or after the first day of July, one thousand eight hundred and sixty-nine, except in case of administrations de bonis non upon estates where the former letters of administration or letters testamentary were granted prior to the first of July, one thousand eight hundred and sixty-nine, in all which cases estates shall be administered, closed up and settled according to the law as it existed just prior to the first of July, one thousand eight hundred and sixty-nine.

Code, s. 1476; 1871-2, c. 213, s. 29; 1872-3, c. 179.

NOTE. To compel surviving partner to settle, see Partnership.
How administrators or executors charge their own estate, see s. 2869.

CHAPTER 2.

ADOPTION OF MINOR CHILDREN.

(Sections 172—179.)

172. Petition filed before clerk, what to contain. Any person desiring to adopt any minor child may file a petition in the superior court of the county wherein such child resides, setting forth the name and age of such child and the name of its parents, whether the parents or either of them be living, and if there be no living parent, the name of the guardian, if any, and if there be no guardian, the name of the person having charge of the child or with whom such child resides, the amount and nature of the child's estate, if any, and especially if the adoption is for the minority or for the life of the child.

Code, s. 1; 1872-3, c. 155.

173. Parties to proceeding. The parent or guardian, or the person having charge of such child, or with whom it may reside, must be a party of record in this proceeding.

Code, s. 6; 1872-3, c. 155, s. 6.

174. Letters of, when granted. Upon the filing of such petition, and with the consent of the parent or parents, if living, or of the guardian, if any, or of the person with whom such child resides, or who may have charge of such child, the court may, if the petitioner be a proper and suitable person, sanction and allow such adoption by an order granting letters of adoption.

Code, s. 2.

175. Effect of order; child to inherit, when; name changed. Such order, when made, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority, for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it: Provided, such child shall not so inherit and be so entitled to the personal estate, if the petitioner specially set forth in his petition such to be his desire and intention: Provided further, for proper cause shown in said petition the court may decree that the name of such child may be changed to that of the petitioner.

Code, s. 3; 1885, c. 390; 1872-3, c. 155, s. 3.

176. Bond to secure orphan's property. If such child be an orphan and without guardian, and shall be possessed of any estate, the court shall require from the petitioner such bond as is required by law to be given by guardians.

Code, s. 4.

177. Clerk to record order; revocation. The order granting letters of adoption shall be recorded in the office of the clerk of the superior court of the county in which it is made, and may be revoked at any time by the court for good cause shown.

Code, s. 5; 1872-3, c. 155, s. 5.

178. Right to custody forfeited by abandonment. In all cases where the surviving parent of any orphan child shall have wilfully abandoned the care, custody, nurture and maintenance of any

orphan child to kindred, relatives or other persons, such parent shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child.

1885, c. 120, s. 1.

179. Restoration of rights and privileges. The rights and privileges of such parent may be restored by the voluntary surrender of such child by the person in whose care and custody such child may be, or by order of any judge of the superior court in the district in which such child may be, when it shall appear to the satisfaction of such judge that the interest and welfare of such child will not be materially prejudiced by such restoration. The person having the care and custody of any such child shall have at least ten days' notice of the time and place of the hearing of the application for such order of restoration, and shall be permitted to resist the same.

1885, c. 120, ss. 2, 3.

NOTE. For contests over custody of children, see Habeas Corpus, s. 1832.

For effect of divorce on children, see Divorce and Alimony, s. 1518.

For right of parent to determine custody of children by deed or will, see Guardian, s. 1739.

For small allowance paid to indigent children by clerk, in certain cases, see s. 877.

CHAPTER 3.

ALIENS.

(Sections 180—181.)

180. May take and hold lands. It shall be lawful for aliens to take both by purchase and descent, or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this state can or may do, any law or usage to the contrary notwithstanding.

Code, s. 7; 1870-1, c. 255.

181. Prior contracts validated. All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes.

Code, s. 8; 1870-1, c. 255, s. 2.

CHAPTER 4.

APPRENTICES.

| | Sections. |
|----------------------|-----------|
| I. Power of clerk, | 182—187 |
| II. The apprentice, | 188—191 |
| III. The employer, | 192—194 |
| IV. The indenture, | 195—198 |
| V. To learn a trade, | 199—204 |

I. POWER OF CLERK.

182. To apprentice, or send to orphanage. Upon complaint made in writing by three reputable citizens to the clerk of the superior court of any county in this state that there is any infant in such county subject to any of the conditions enumerated in this chapter, it shall be the duty of the said clerk of the superior court upon ten days' notice to the complainants, and the parents or persons with whom such infant resides, to examine into the allegations of the said complaint upon oath, and if the said clerk of the superior court shall find upon such examination that the conditions set forth in such complaint are true, it shall be the duty of said clerk in his discretion to procure for said infant admission into some orphan asylum in the state, or to bind out the said infant as an apprentice.

1889, c. 169, s. 2; 1901, c. 628.

183. To determine incapacity, desertion or drunkenness. Incapacity, desertion or drunkenness shall be decided before the clerk of the superior court upon application, as in special proceedings, when necessary.

1889, c. 169, s. 19.

184. Must examine persons as to circumstances; tradesmen of useful art preferred. On application of any person to have an apprentice bound to him, it shall be the duty of the clerk to inform himself of the circumstances of the case, and for this purpose he may cite before him the relatives of the orphan or infant for examination on oath, and he may examine also such other persons as he may deem proper. In the selection of an employer, he shall prefer, so far as may be consistent in other respect with the comfort and interest of the apprentice, some tradesman of a useful art or mystery. No white child shall be apprenticed to a negro.

1889, c. 169, ss. 1, 8.

185. May modify; discharge apprentice and re-apprentice.

The clerk shall have power, when circumstances require it, upon application of either the employer or the apprentice, to modify the indentures of an apprentice or to discharge him from his apprenticeship; and in case any money or other thing of value has been paid by either party in relation to such apprenticeship, the clerk shall make such order concerning the same as shall be just and reasonable; and he shall have power where an apprentice is discharged to re-apprentice him, when such a course shall seem proper and practicable.

1889, c. 169, s. 13.

186. May direct disposition of wages.

When money, wages or other thing of value is agreed to be paid to the apprentice, the clerk is empowered to direct such disposition of the same as shall seem to him just and proper; and in the case of money, he may either direct that so much be placed at the disposal of the apprentice as shall be proper, or so much paid to the parents of the apprentice for their use, or so much paid into the clerk's office to the credit of the said apprentice.

1889, c. 169, s. 5.

187. Guardian to be appointed when \$100 in clerk's hands.

Whenever as much as one hundred dollars shall come into the hands of any clerk of the superior court belonging to an apprentice by reason of the preceding section, it shall be his duty to appoint and qualify a guardian for the estate of said apprentice, and turn the said funds over to said guardian for investment; and the said guardian shall be appointed and qualified and be governed by the same rules and regulations as guardians of said estate.

1889, c. 169, s. 6.

NOTE. For payment by clerk to indigent child of estate less than twenty dollars, see Guardian.

II. THE APPRENTICE.

188. Who may be apprenticed. Children who may be apprenticed shall include:

1. All orphans whose estates are of so small value that no person will educate and maintain them for the benefit thereof.

2. All infants whose fathers have deserted their families and been absent six months, leaving them without sufficient support.

3. Any poor child who is or may be chargeable to the county or shall beg alms.

4. Any child who has no father, and the mother is of bad char-

acter, or suffers her children to grow up in habits of idleness, without any visible means of obtaining an honest livelihood.

5. All infants whose parents do not habitually employ their time in some honest, industrious occupation.

6. All indigent infants under sixteen years of age who, on account of the neglect, crime, drunkenness, lewdness or other vice of the parents, or person with whom such infants reside, are in circumstances exposing such infants to lead an idle and dissolute life.

1889, c. 169, s. 2; 1901, c. 628.

189. May make complaint of ill usage, violation of indenture; duty of clerk. Upon the complaint of any apprentice that his employer is guilty of cruelty or ill usage toward said apprentice, or refuses him necessary provisions or clothing, or violates any other stipulation of the indenture or of the law toward such an apprentice, the clerk may, by order, compel the appearance of the said employer before him, when he shall examine and determine the complaint, and if the same is well founded, he shall cancel the indenture and discharge such apprentice from his obligation of service, and may proceed to apprentice the discharged infant to some other employer.

1889, c. 169, s. 10.

190. Compelled to serve. If an apprentice refuses to serve as required by the indenture or by law, the clerk may, on application of the employer, compel him by citation or otherwise to appear for inquiry into the facts and if the complaint is well founded and the apprentice persists in such refusal, the clerk may commit him by warrant to the house of correction or to the common jail of the county until he consents.

1889, c. 169, s. 9.

191. Person enticing away apprentice, penalty. If any person shall entice away an apprentice from his employer, he shall pay therefor three dollars for every day the apprentice shall remain out of the service of the said employer; and any person who shall knowingly conceal, harbor or employ such an apprentice shall in like manner pay the employer therefor three dollars per day for every day such apprentice shall be concealed, harbored or employed.

1889, c. 169, s. 15.

III. THE EMPLOYER.

192. Shall provide, what. Whenever an indigent child shall be apprenticed, his employer shall, in the indenture, agree to provide (1) diet, clothes, lodging and accommodations fit and necessary;

(2) that the apprentice be taught to read and write and the rules of arithmetic to the double rule of three; (4) such other education as may be agreed upon and inserted in the indenture by the clerk; (5) the clerk shall also insert in the indenture the amount of money or other thing of value to be paid to the apprentice by his employer annually during the continuance of the apprenticeship, so that the indenture will show the compensation to be paid the apprentice for each year's service.

1889, c. 169, s. 4.

193. Annual report made by, to clerk. Employers of apprentices shall be required in the indentures made before the clerk to make a report annually to him as to whether the stipulations in the indenture have been performed or not, as required in the same, in which shall be set forth the amount to be paid, and the amount actually paid said apprentice, and also the progress and general condition of the apprentice, including his moral, mental and physical condition; which report shall be required under the same pains, penalties and regulations as is required of guardians. The said employer shall also, at the end of the apprenticeship, make a final report to the clerk as to the apprenticeship as guardians are required to do.

1889, c. 169, s. 7.

194. Shall not remove apprentice from state; indenture cancelled, when. It shall not be lawful for an employer to remove an apprentice out of this state, and whenever any employer of an apprentice shall wish to remove out of this state, or to quit his trade or business, he shall appear with his apprentice before the clerk of the proper county, and if the clerk be satisfied the employer has done justice to the said apprentice for the time he has had charge of him, he shall have power to discharge such apprentice from the service of such employer and again bind him, if necessary, to some other person.

1889, c. 169, s. 14.

IV. THE INDENTURE.

195. In name of clerk and employer. Indigent children when apprenticed shall be indentured in the name of the superior court clerk of the county where they reside, of the first part, and the employer to whom apprenticed, of the other part.

1889, c. 169, s. 1.

196. For what time apprenticed. Indigent male children may be apprenticed till the age of twenty-one, and females till the age of eighteen; but said children shall be apprenticed for a less number of years, whenever in the opinion of the clerk the best interests of

the apprentice will be subversed thereby. The age of children when apprenticed shall always be inserted in the indenture.

1889, c. 169, s. 3.

197. Relator in action on indenture; limitation. The apprentice may bring an action on the indenture in the name of the clerk and his successors in office and recover any damages sustained by reason of the breach of the covenants contained in said indenture; but no action on an indenture shall be commenced after two years from the expiration of the term of service.

1889, c. 169, s. 11.

198. Indentures to be registered by register of deeds. Every indenture binding an apprentice to be effectual shall be proved and recorded in the register of deeds' office of the county where the parties thereto reside, as deeds and conveyances, and shall be subject to the same rules of evidence as deeds and conveyances.

1889, c. 169, s. 20.

V. TO LEARN A TRADE.

199. Who may be apprenticed. Minor children above the age of fourteen and under twenty-one years being males, and eighteen being females, whether indigent or not, may be apprenticed to learn the art or mystery of any trade or craft by their father, or in case of his death, incompetency, or where he shall have wilfully abandoned his family for six months without making suitable provisions for their support, or has become an habitual drunkard, by their mother or by their legal guardian; and if illegitimate, they may be bound by their mother, and if they have no parent competent to act and no guardian, they may bind themselves with the approbation of the superior court clerk of the county where they reside; but the power of a mother to bind her children, whether legitimate or illegitimate, shall cease upon her subsequent marriage and shall not be exercised by herself or her husband at any time during such marriage. But no white child shall be bound to a colored person, and no colored child shall be bound to any white person if a competent and suitable colored person can be found in the county who desires such child bound to him.

1889, c. 169, s. 17.

200. Apprentices over fourteen to sign indenture. When an apprentice is bound who is over fourteen years of age, as provided in the foregoing section, his or her consent shall be expressed in the indenture and testified to by signing the same, and the age of said apprentice shall also be inserted in said indenture.

1889, c. 169, s. 18.

201. Orphan asylum may execute indentures. Any orphan asylum, or charitable institution organized and incorporated for the purpose of taking care of indigent children under any general or special law of this state, is hereby authorized and empowered to execute indentures apprenticing children in their charge for the purpose of learning trades, the said children being fourteen years of age, and they shall have the same rights and assume the same liabilities thereunder as in case of natural persons.

1889, c. 169, s. 21.

202. What indenture to contain. All indentures apprenticing minors to learn trades shall contain the following covenants and provisions:

1. That said minor shall be bound to serve his employer for a term of not less than three nor more than five years.

2. That said minor so indentured shall not leave his said employer during the term for which he shall be indentured, and if any apprentice so indentured as aforesaid shall leave his employer except as hereinafter provided, the said employer may compel the return of said apprentice under the penalties of this chapter.

3. That said employer shall covenant and agree in said indenture as to the compensation which is to be given the apprentice annually, specifying board, medical attention, lodging and clothes, when they are to be given, and also the wages to be paid in money and at what periods to be paid, and to whom.

4. That the said employer shall teach, or cause to be carefully and skillfully taught, to said apprentice every branch of the business to which he is indentured.

5. That said employer shall, at the expiration of said apprenticeship, give to said apprentice a certificate in writing stating that said apprentice has served a full term of apprenticeship of not less than three nor more than five years at such trade or craft as may be specified in said indenture.

6. That if either the employer or the apprentice, during the continuance of the apprenticeship, shall be unavoidably prevented from performing any of the conditions of the indenture and a settlement with respect to the same cannot be made by the parties to the indenture, the matter shall be referred to arbitrators for settlement, one to be selected by the employer and one on the part of the apprentice, and if they can not decide the controversy, the two arbitrators chosen to select a third, and the decision of any two of said arbitrators to be final as to the matters in controversy.

1889, c. 169, s. 22.

203. Apprentice compelled to serve, how. Any apprentice, so indentured, who shall leave his employer without his consent, or with-

out sufficient cause, and shall refuse to return, may be arrested upon complaint of said employer and taken before any justice of the peace of the county where the employer resides, and said justice of the peace may order said indentures cancelled, and on conviction may commit said apprentice to the house of correction or county jail until said apprentice agrees to abide by the indenture, which shall not exceed thirty days; and in case said apprentice so indentured shall still wilfully neglect or refuse to perform his portion of the contract as specified in said indenture, then said indenture may be cancelled in the manner aforesaid, and said apprentice so violating said indenture shall forfeit all back pay and all claims against said employer: Provided, either party shall have right of appeal.

1889, c. 169, s. 23.

204. Employer failing to teach apprentice liable for damages and a penalty. Should any employer neglect or refuse to teach or cause to be taught to said apprentice the art or mystery of the trade or craft to which said apprentice has been indentured, or fail to perform any of the stipulations of the indenture, said apprentice, by his parent, guardian or next friend, may bring an action against said employer to recover damages sustained by reason of said neglect or refusal; and if proved to the satisfaction of the court, said court shall direct said indenture to be cancelled and may impose a penalty on said employer not exceeding three hundred dollars and not less than fifty dollars, and said penalty shall be collected and paid over to said apprentice or his parent or guardian for his sole use and benefit.

1889, c. 169, s. 24.

NOTE. For wilful violation of duty to an apprentice by his employer, see Crimes.

CHAPTER 5.

ATTORNEYS AT LAW.

| | Sections. |
|--------------------------|-----------|
| I. How licensed, | 205—208 |
| II. Debarred, | 209—210 |
| III. Relation to client, | 211—213 |
| IV. Arguments, | 214 |

I. HOW LICENSED.

205. Examination. No person shall practice law without first obtaining license so to do from the supreme court. Applicants for license shall be examined only on the first Monday of each term of

the supreme court. All examinations shall be in writing, and based upon such course of study, and conducted under such rules, as the court may prescribe. All applicants who shall satisfy the court of their competent knowledge of the law shall receive license to practice in all the courts of this state.

Code, s. 17; R. C., c. 9, s. 1; 1818, c. 963, s. 3.

206. Conditions precedent to examination. Before being allowed to stand an examination each applicant must comply with the following conditions:

1. He must be at the time twenty-one years of age, or will arrive at that age before the time for the next examination.

2. He must file with the clerk of the court a certificate of good moral character signed by two attorneys who practice in that court. An applicant from another state may have such certificate signed by any state officer of the state from which he comes.

3. He must deposit with the clerk twenty-one dollars and fifty cents. Of this sum one dollar and fifty cents shall be retained by the clerk. If the applicant obtains license the remaining twenty dollars shall be paid by the clerk to the librarian for use of the supreme court library. If the applicant fails on examination the twenty dollars shall be repaid him.

Code, s. 18; R. C., c. 9, s. 2; 1777, c. 115, s. 8.

207. Oath taken in open court. Attorneys before they shall be admitted to practice law shall, in open court before a justice of the supreme or judge of the superior court, take the oath prescribed for attorneys, and also the oaths of allegiance to the state, and to support the constitution of the United States, prescribed for all public officers, and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken, may act as attorneys during their good behavior.

Code, s. 19; R. C., c. 9, s. 3; 1777, c. 115, s. 8.

208. Persons disqualified. No clerk of the superior or supreme court, nor deputy or assistant clerk of said courts, nor any justice of the peace, nor county commissioner shall practice law.

Code, ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 406; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424.

NOTE. Persons above named practicing law guilty of misdemeanor, see Crimes.

II. DEBARRED.

209. For crime. No person who shall have been duly licensed to practice law as an attorney shall be debarred or deprived of his license and right so to practice law, either permanently or tempo-

rarily, unless he shall have been convicted, or in open court confessed himself guilty, of some criminal offense showing him to be unfit to be trusted in the discharge of the duties of his profession, and unless he shall be debarred according to the provisions of this chapter.

Code, s. 26; 1870-1, c. 216, s. 4.

210. Failure to account to client. Whenever a final judgment has been recovered against an attorney at law for property received or money collected for his client, the clerk of the court shall retain such cause on the trial docket until the next term of such court beginning not less than ninety days after the rendition of such final judgment. If such judgment be not then satisfied, the judge presiding shall ex mero motu make an order, which shall be entered on the records of the court, debarring such attorney at law from practicing law in any of the courts, and he shall thereby be debarred from so practicing. When any such judgment shall be rendered in the court of a justice of the peace, and it is thereupon sought to debar an attorney at law under this section, the cause shall be docketed on the civil issue docket of the superior court, and written notice served on such attorney ninety days before action by the court.

Code, ss. 24, 25; 1881, c. 129.

III. RELATION TO CLIENT.

211. Authority filed or produced if requested. Every attorney who shall claim to enter an appearance for any person shall, upon being required so to do, produce and file in the clerk's office of the court in which he shall claim to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: Provided, that when any attorney shall claim to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it shall be necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket.

Code, s. 29; R. C., c. 31, s. 57 (16).

212. Failure to file complaint makes attorney liable for costs. When a plaintiff shall be compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by

him so paid, and the receipt of the clerk may be given in evidence in support of such claim.

Code, s. 22; R. C., c. 9, s. 5; 1786, c. 253, s. 6.

213. Fraud renders liable for double damages. If any attorney shall commit any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages.

Code, s. 23; R. C., c. 9, s. 6; 1743, c. 37.

IV. ARGUMENTS.

214. Control of by court. In all trials in the superior courts there shall be allowed two addresses to the jury for the state or plaintiff and two for the defendant, except in capital felonies when there shall be no limit as to number. The judges of the superior court are also authorized to limit the time of argument on the trial of all actions, civil and criminal, except in capital felonies, but in no instance shall the time be limited to less than one hour on each side in misdemeanors, or to less than three hours on each side in other causes. Where any greater number of addresses or any extension of time shall be desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.

1903, c. 433.

CHAPTER 6.

AUCTIONEERS.

(Sections 215—219.)

215. How appointed. Any citizen of the state, desiring to exercise the business of an auctioneer, shall apply to the board of county commissioners of the county in which he proposes to carry on such business, and, upon his giving bond payable to the state of North Carolina, to be approved by said commissioners or other authority, conditioned that he will perform faithfully all the duties required of auctioneers, the sheriff shall issue to him a license to act as an auctioneer in said county for twelve months from the date of the

license. The bond shall in no case be less than five hundred dollars, and if the applicant reside in an incorporated town or city having not less than thirty-five hundred nor more than five thousand inhabitants, said bond shall be one thousand dollars, and one thousand dollars additional for every additional five thousand inhabitants or fraction thereof amounting to thirty-five hundred and above.

Code, s. 2281; 1889, c. 40; 1891, c. 576; R. C., c. 10, s. 1.

216. Duties; semi-annual accounts. It shall be the duty of such auctioneers, on the first days respectively of October and April, to render to the clerks of the superior court of their respective counties a true and particular account in writing of all the moneys made liable to duty by law, for which any goods, wares, or merchandise may have been sold at auction, and also at private sale, where the price of the goods, wares and merchandise sold at private sale was fixed or agreed upon or governed by any previous sale at auction, of any goods, wares and merchandise of the same kind; which account shall contain a statement of the gross amount of sales by them made for each particular person or company at one time, the date of each sale, the names of the owners of the goods, wares and merchandise sold, and the amount of the tax due thereon, which tax they shall pay as directed by law. Which statement shall be subscribed by them and sworn to before the clerk of the said court, who is hereby authorized to administer the oath. And it shall be their further duty to account with and pay to the person entitled thereto the moneys received on the sales by them made.

Code, s. 2282; R. C., c. 10, s. 2.

217. Penalty, acting without appointment. No person shall exercise the trade or business of an auctioneer, by selling any goods, wares or merchandise by auction or by any other mode of sale whereby the best or highest bidder is deemed to be the purchaser, unless such person shall be appointed an auctioneer pursuant to this chapter, on pain of forfeiting to the state for every such sale the sum of two hundred dollars, which shall be prosecuted to recovery by the solicitor of the district.

Code, s. 2283; R. C., c. 10, s. 5.

218. To sales of what articles applicable. Nothing in this chapter shall extend to any sale by auction of goods, wares and merchandise made pursuant to and in execution of any order, decree or judgment of the courts of the United States or of this state; or made in consequence of any assignment of property and estate for the benefit of creditors; or made by executors, administrators, collectors or guardians; or made pursuant to any law touching the collection of any tax or duty, or sale of any wrecked goods; or to

any article the product of the agriculture of this state, in its natural or unmanufactured state; or to any species of stock or domestic animals; or to any articles of household furniture, or farming utensils which have been in use; but shall extend only to such articles of goods, wares and merchandise as are the ordinary subject of traffic and sale by merchants and traders.

Code, s. 2284; R. C., c. 10, s. 6.

219. Commissions; pay one per cent. to town. Auctioneers shall be entitled to such compensation as may be agreed upon, not exceeding two and a half per cent. on the amount of sales; and auctioneers of incorporated towns shall retain and pay one per cent. of the gross amount of sales to the commissioners or other authority of their respective towns.

Code, s. 2285; R. C., c. 10, s. 7.

CHAPTER 7.

BASTARDY.

(Sections 220—231.)

220. Justices have jurisdiction; warrant issued only on complaint of woman or county commissioner. Justices of the peace of the several counties shall have exclusive original jurisdiction to issue, try and determine all proceedings in cases of bastardy in their respective counties. A warrant in bastardy shall be issued only upon the voluntary affidavit and complaint of the mother of the bastard; or, upon the affidavit of one of the county commissioners, setting forth the fact that the bastard is likely to become a county charge.

Code, s. 31.

221. Procedure on complaint by county commissioner. When complaint is made on affidavit by one of the county commissioners, as set forth in the preceding section, to any justice of the peace of the county in which the woman resides, that any single woman within his county is big with child, or delivered of a child, he may cause her to be brought before him, or any other justice of the county, to be examined upon oath respecting the father; and if she

shall refuse to declare the father, she shall pay a fine of five dollars and give a bond payable to the state with sufficient surety to keep such child from being chargeable to the county, otherwise she shall be committed to prison until she shall declare the same, or pay the fine aforesaid and give such bond.

Code, s. 32.

222. Procedure when woman declares father. If any woman shall, upon oath, accuse any man of being the father of her bastard child, the justice before whom such oath is made shall cause him to be brought before some justice of the peace of such county to answer the charge; and, if he shall, upon oath, deny that he is the father of such child the justice shall proceed to try the issue of paternity, and if it shall be found that he is the father of the child, or if he shall not deny upon oath that he is the father of the child, then he shall stand charged with the maintenance thereof, as the court may order, and shall give bond, with sufficient surety, payable to the state, to perform said order, and to indemnify the county where such child shall be born from charges for his maintenance and may be committed to prison until he finds surety for the same, and shall be liable for the costs of the issue or proceeding, and from this judgment and finding the affiant, the woman or the defendant may appeal to the next term of the superior court of the county where the trial is to be had *de novo*.

Code, s. 32.

223. Procedure on appeal. Upon the trial of the issue, whether before the justice or at term, the examination of the woman, taken and returned, shall be presumptive evidence against the person accused, subject to be rebutted by other testimony which may be introduced by the defendant; and, if the jury at term shall find that the person accused is the father of the child then the judge shall make the order for the maintenance and for costs of proceeding, and shall take bond from the defendant and his sureties for the maintenance of the child and to indemnify the county and pay the costs; and, in default thereof, may imprison the defendant.

223a. Putative father out of county. If the putative father shall escape or be in any other county than that of the justice issuing the warrant, it shall be issued, endorsed, executed and returned as provided in warrants in criminal actions.

224. Upon appeal parties and witnesses recognized. When an appeal shall be taken the justice shall recognize the person accused of being the father of the child with sufficient surety for his appearance at the next term of the superior court for the county, and to

abide by and perform the order of the court; said justice shall also recognize the woman and other witnesses to appear at said superior court, and shall return to said court the original papers in the proceeding and a transcript of his proceedings as required in other cases of appeal. If the putative father fails to appear the court shall proceed to hear and determine the issue.

Code, s. 33.

225. Case may be continued till birth of child. When the judge or justice, as the case may be, trying the issue of paternity, shall deem it proper, he may continue the case until the woman shall be delivered of the child; but when a continuance is granted, the court shall recognize the person accused of being the father of the child with surety for his appearance either at the next term of the court or at a time to be fixed by the justice granting the continuance, which shall be after the delivery of the woman.

Code, s. 34.

226. Fine, allowance and bond. When the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the judge or justice not exceeding the sum of ten dollars and the court shall make an allowance to the woman not exceeding the sum of fifty dollars, to be paid in such instalments as the judge or justice shall see fit, and he shall give bond to indemnify the county as prescribed by law; and in default of such payment he shall be committed to prison.

Code, s. 35.

227. Action barred in three years after birth. All examinations upon oath to charge any man with being the father of a bastard child shall be taken within three years next after the birth of the child, and not after.

Code, s. 36.

228. Execution may issue for maintenance. When the judge or justice shall charge the father of a bastard child with its maintenance and the father shall neglect to pay the same, then the judge or justice, upon application of the party aggrieved, notice being served on the defendant at least ten days before the return day stated in the notice, or such notice being returned by the sheriff or constable that the defendant is not to be found, may order an execution against the goods, chattels, lands and tenements of the father for such sum as the court shall adjudge sufficient for the maintenance of the bastard child.

Code, s. 37.

229. Putative father when committed or apprenticed. In all cases arising under this chapter, when the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such putative father shall, by law, be subject to be committed to prison in default of paying the same, it shall be competent for the court to sentence such putative father to the house of correction for such time, not exceeding twelve months, as the court may deem proper: Provided, that such person or putative father, at his discretion, instead of being committed to prison or to the house of correction, may bind himself as an apprentice to any person whom he may select, for such time and at such price as the court may direct. The binding shall be by indenture in open court, and the price obtained shall be paid to the county treasurer. On the indenture being signed by the presiding judge of the court and by the master receiving such apprentice, the person thus bound shall be treated and regarded as an apprentice in all matters except education.

Code, s. 38.

230. Procedure for legitimating bastards. The putative father of any illegitimate child may apply by petition in writing to the superior court of the county in which the father may reside, praying that such child may be declared legitimate; and if it shall appear that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree.

Code, s. 39.

231. Effects of legitimation. The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock; and in case of death and intestacy, the real and personal estate of such child shall be transmitted and distributed according to the statute of descents and distribution among those who would be his heirs and next of kin in case he had been born in lawful wedlock.

Code, s. 40.

CHAPTER 8.

BONDS.

| | Sections. |
|-----------------------------------|-----------|
| I. Mortgage in lieu of, | 232—237 |
| II. In surety companies, | 238—243 |
| III. Officer acting without, | 244-5 |
| IV. Irregularity, | 246 |
| V. Actions on, | 247—252 |
| VI. State officers, | 253—258 |
| VII. County officers, | 259—269 |
| VIII. Pilots, | 270 |
| IX. Duty of county commissioners, | 271—278 |
| X. Duty superior court judge, | 279—281 |
| XI. Fiduciaries, | 282—287 |

I. MORTGAGE IN LIEU OF.

232. Fiduciary or official. Any administrator, executor, guardian, collector or receiver, or any officer required to give an official bond, or the agent or surety of such person or officer, may execute a mortgage on real estate, of the value of the bond required to be given by such administrator, executor, guardian, collector, receiver or officer, to the state of North Carolina, conditioned to the same effect as the bond should be, were the same given, with a power of sale, which power of sale may be executed by the clerk of the superior court, with whom said mortgage shall be deposited, upon a breach of any of the conditions of said mortgage, after advertisement for thirty days.

Code, s. 118; 1874-5. c. 103, s. 2.

233. Appearance; security for costs or fine. Any person required to give a bond or undertaking, or required to enter into a recognizance for his appearance at any court, in any criminal proceeding, or for the security of any costs or fine in any criminal action, may also execute a mortgage on real or personal property of the value of such bond or recognizance, payable to the state of North Carolina, conditioned as such bond or recognizance would be required, with power of sale, which power shall be executed by the clerk or justice of the peace in whose court said mortgage shall be executed, upon a breach of any of the conditions of said mortgage: Provided, that where such mortgage upon real property is executed before a justice of the peace the power of sale shall be enforced by the clerk of the court of the county in which the criminal proceeding is had: And provided further, that no such mort-

gage on real property executed for the security for costs or fine shall allow a longer time for payment of said costs or fine than six months from the execution thereof, and no mortgage on personal property a longer time than three months, except in cases of appeal, when the time allowed shall be counted from the date of the final decision in the cause: And provided further, that all legitimate expenses of sale, which shall only be made after due advertisement according to law, shall be paid out of the proceeds of the sale of the mortgaged property, as shall also the following fees, to-wit: For each sale of real property mortgaged under this section the clerk shall receive two dollars, and for each sale of personal property mortgaged under this section the clerk or justice of the peace who enforces the power of sale shall receive one dollar.

Code, s. 120; 1874-5, c. 103, s. 3; 1891, c. 425, ss. 1, 2, 3.

234. Clerk superior court; depository of. In all cases where the clerk of the superior court may be required to give surety, he may deposit a mortgage with the register of deeds, payable to the state, and conditioned, as the bond would have been required, with power of sale. The power of sale shall be executed by the register of deeds, upon a breach of any of the conditions of said mortgage; and the register of deeds shall in all cases immediately register the same, at the expense of the said clerk.

Code, s. 122; 1874-5, c. 103, s. 6.

235. Prosecution. It shall be lawful for any person desiring to commence any civil action or special proceeding, or to defend the same, his agent or surety, to execute a mortgage on real estate of the value of the bond or undertaking, required to be given at the beginning of said action, or at any stage thereof, to the party to whom the bond or undertaking would be required to be made, conditioned to the same effect as such bond or undertaking, with power of sale, which power of sale may be executed upon a breach of any of the conditions of the said mortgage after advertisement for thirty days.

Code, s. 117; 1874-5, c. 103, s. 1.

236. Affidavit of value of property required. In all cases where a mortgage is executed, as hereinbefore permitted, it shall be the duty of the clerk of the court in which it is executed, or of the justice, to require an affidavit of the value of the property mortgaged, to be made by at least one witness not interested in the matter, action or proceeding in which the mortgage is given.

Code, s. 121; 1874-5, c. 103, s. 4.

237. Additional security required, when. If, from any cause, the property mortgaged in lieu of a bond shall become of less value than

the amount of the bond in lieu of which the mortgage is given, and it shall so appear upon affidavit of any person having any interest in the matter as a security for which the mortgage was given, it shall be the duty of the mortgagor to give additional security by a deposit of money, or the execution of a mortgage on more property, or justify as required in cases where bond or undertaking is given.

Code, s. 119; 1874-5, c. 103, s. 5.

II. IN SURETY COMPANIES.

238. By state officers. All persons who are required to give bond to the state of North Carolina to be received by the governor or by any department of the state government shall, in lieu of personal security, are permitted to give as security for said bond and for the performance of the duties named in the said bond any indemnity or guaranty company authorized to do business in the state of North Carolina, subject to such regulations as the governor or department may prescribe, and with power in them to demand additional security at any time.

1901, c. 754.

239. Municipal officers; fiduciaries; litigants, etc. Whenever, by the law of North Carolina, or by the regulation of any board, body or organization in this state, any bond, recognizance, obligation or undertaking is required of, permitted to be made, given, tendered or filed by any sheriff, clerk of a court, register of deeds, tax collector, treasurer, constable or coroner, mayor, clerk, policeman, weigher or standard keeper of any county, city, town or township in this state, or by any trustee, receiver, guardian, administrator, executor, assignee, or any other fiduciary, or party to a civil action or proceeding, either for the prosecution thereof or for any other purpose whatsoever in the course of the action, or by any officer of any town or city, conditioned for the doing or not doing of anything, in such bond, recognizance, obligation or undertaking specified, any and all clerks of the superior courts, municipal officers, boards, courts and judges, now or hereafter permitted to accept, approve or pass upon the sufficiency of such bond, recognizance, obligation or undertaking shall accept such bond, recognizance, obligation or undertaking, and approve the same, whenever the same is executed or the conditions thereof are guaranteed by a corporation of this or any other state licensed in this state, which corporation under its charter is authorized to act as guardian or other trustee, or to guarantee the fidelity of any persons holding places of public and private trusts, and to guarantee the performance of contracts, other than insurance policies, and to execute and guarantee bonds

and undertakings required or permitted in actions or proceedings, as by law allowed. Whenever such bond, recognizance, obligation or undertaking is so required or permitted to be made, given, tendered or filed with one surety, or with two or more sureties, the execution of the same, or the guaranteeing of the performance of the condition thereof, shall be sufficient when executed or guaranteed solely by such company so authorized, and shall be in all respects a full and complete compliance with every requirement of every law, rule and regulation that such bond, recognizance, obligation or undertaking shall be executed by one surety or two sureties, and that such surety or sureties shall be residents or freeholders, and such bond, recognizance, obligation or undertaking shall be accepted and approved when executed by such company: Provided, the clerk of the superior court may have discretion as to the acceptance of any bond on which said company or companies may become sureties on the bonds of guardians, executors, administrators, assignees, or other fiduciary or any other party to a civil action or proceeding.

1895, c. 270; 1899, c. 54, s. 45; 1901, c. 706.

240. How released from liability. Any company executing such bond, obligation or undertaking, may be released from its liability or security on the same terms as are or may be by law prescribed for the release of individuals upon any such bonds, obligations or undertakings.

1899, c. 54, s. 48.

241. Estoppel to plead ultra vires; penalty failure to pay judgment. Any company which shall execute any bond, obligation or undertaking under the provisions of this subchapter shall be estopped in any proceeding to enforce the liability which it shall assume to incur, to deny its corporate power to execute such instrument or assume such liability. If any surety company against which a judgment shall have been recovered shall fail to discharge the same within sixty days from time such final judgment is rendered, it shall forfeit its right to do business in this state, and the insurance commissioner shall cancel its license.

1899, c. 54, s. 49; 1901, c. 706, s. 1, sub-s. 5.

242. When accepted and officer inducted. Upon presentation to the person authorized by law to take, accept and file official bonds, of any bond duly executed in the penal sum required by law by the officer chosen to any such office, as principal, and by any surety company, as security thereto, whose insurance or guaranty is accepted as security upon the bonds of United States bonded officials (such insurance company having complied with the insurance laws of the state of North Carolina), or by any other good and sufficient

security thereto, such bond shall be received and accepted as sufficient, and the principal thereon shall be inducted into office.

1899, c. 54, s. 53; 1901, c. 706, s. 1, sub-s. 5.

243. Expense of fiduciary bond charged to fund. Any receiver, assignee, trustee, committee, guardian, executor or administrator, or other fiduciary required by law to give a bond as such, may include as part of his lawful expenses such sums paid to such companies for such suretyship not exceeding one-half of one per cent. per annum on the account of such bonds as the clerk, judge or court may allow.

1901, c. 706, s. 1, sub-s. 5.

NOTE. For requisites for surety companies to be accepted as bondsmen, see Insurance.

III. OFFICER ACTING WITHOUT.

245. Penalty for. Every person or officer of whom an official bond is required, who shall presume to discharge any duty of his office before executing such bond in the manner prescribed by law, is liable to a forfeiture of five hundred dollars to the use of the state for each attempt so to exercise his office.

Code, s. 1882; R. C., c. 78, s. 8; 1868-9, c. 169, s. 9.

IV. IRREGULARITY.

246. Informal taking, not to invalidate. Whenever any instrument shall be taken by or received under the sanction of the board of county commissioners, or by any person or persons acting under or in virtue of any public authority, purporting to be a bond executed to the state for the performance of any duty belonging to any office or appointment, such instrument, notwithstanding any irregularity or invalidity in the conferring of the office or making of the appointment, or any variance in the penalty or condition of the instrument from the provision prescribed by law, shall be valid and may be put in suit in the name of the state for the benefit of the person injured by a breach of the condition thereof, in the same manner as if the office had been duly conferred or the appointment duly made, and as if the penalty and condition of the instrument had conformed to the provisions of law: Provided, that no action shall be sustained thereon because of a breach of any condition thereof or any part of the condition thereof which is contrary to law.

Code, s. 1891; R. C., c. 78, s. 9; 1842, c. 61; 1869-70, c. 169, s. 16.

V. ACTIONS ON.

247. Taken in judicial proceedings brought in name of state.

Bonds and other obligations taken in the course of any proceeding in law, under the direction of the court, and payable to any clerk, commissioner, or officer of the court, for the benefit of the suitors in the cause, or others having an interest in such obligation, may be put in suit in the name of the state.

Code, s. 51; R. C., c. 13, s. 11.

248. Official bonds, relator; successive suits. Every person injured by the neglect, misconduct, misbehavior in office of any clerk of the superior court, register, entry-taker, surveyor, sheriff, coroner, constable, county treasurer, or other officer may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the state, without any assignment thereof; and no such bond shall become void upon the first recovery, or if judgment shall be given for the defendant, but may be put in suit and prosecuted from time to time until the whole penalty shall be recovered, and every such officer, and the sureties on his official bond, shall be liable to the person injured for all acts done by said officer by virtue or under color of his office.

Code, s. 1883; R. C., c. 78, s. 1; 1793, c. 384, s. 1; 1833, c. 17; 1825, c. 1226; 1869-70, c. 169, s. 10.

249. Complaint must show party in interest; may sue officer individually. Any person who may bring suit in manner aforesaid shall state in his complaint on whose relation and in whose behalf the suit is brought, and he shall be entitled to receive to his own use the money recovered; but nothing herein contained shall prevent such person from bringing at his election an action against the officer to recover special damages for his injury.

Code, s. 1884; R. C., c. 78, s. 2; 1793, c. 384, ss. 2, 3; 1869-70, c. 169, s. 11.

250. Summary remedy on official bond. Whenever a sheriff, coroner, constable, clerk, county or town treasurer, or other officer, shall have collected or received any money by virtue or under color of his office, and on demand shall fail to pay the same to the person entitled to require the payment thereof, the person thereby aggrieved may move for judgment in the superior court against such officer and his sureties for any sum demanded; and the court shall try the same and render judgment at the term when the motion shall be made, but ten days' notice in writing of the motion must have been previously given.

Code, s. 1889; R. C., c. 78, s. 5; 1819, c. 1002; 1869-70, c. 169, s. 14; 1876-7, c. 41, s. 2.

251. Damages against officers for money unlawfully detained. Whenever money received as aforesaid shall be unlawfully detained by any of said officers, and the same shall be sued for in any mode whatever, the plaintiff shall be entitled to recover, besides the sum detained, damages at the rate of twelve per centum per annum from the time of detention until payment.

Code, s. 1890; R. C., c. 78, s. 9; 1819, c. 1002, s. 2; 1868-9, c. 169, s. 15.

251a. Evidence against principal admissible against sureties. In actions brought upon the official bonds of clerks of courts, sheriffs, coroners, constables, or other public officers, and also upon the bonds of executors, administrators, collectors or guardians, when it may be necessary for the plaintiff to prove any default of the principal obligors, any receipt or acknowledgment of such obligors, or any other matter or thing which, by law would be admissible and competent for or toward proving the same as against him, shall in like manner be admissible and competent as presumptive evidence only against all or any of his sureties who may be defendants with or without him in said actions.

Code, s. 1345; R. C., c. 44, s. 10; 1844, c. 38; 1881, c. 8.

252. Officer liable for the debt, when. When a claim shall be placed in the hands of any sheriff, coroner or constable for collection, and he shall not use due diligence in collecting the same, he shall be liable for the full amount of the claim notwithstanding the debtor may have been at all times and is then able to pay the amount thereof.

Code, s. 1888; R. C., c. 78, s. 3; 1844, c. 64; 1869-70, c. 169, s. 12.

VI. STATE OFFICERS.

253. Secretary of state. The secretary of state shall give bond with sufficient surety, approved by the governor and auditor, for the sum of twenty thousand dollars, payable to the state, and conditioned for the faithful performance of his duties. And the bond of the secretary of state shall be deposited in the treasurer's office for safe keeping; and he shall take the oath prescribed for public officers.

Code, s. 3338; 1868-9, c. 270, ss. 42, 43.

254. Treasurer. The treasurer shall, after he receives notice of his election, and before he enters upon the execution of the duties of his office, give a bond to the state in the sum of two hundred and fifty thousand dollars, with not less than four sufficient sureties, to be approved by the president of the senate and speaker of the house of representatives, conditioned that he will faithfully execute the duties of his office, which bond shall be deposited in the office of

the secretary of state, and shall be deemed to extend to the faithful execution of the office of treasurer by the person elected thereto, until a new election of treasurer be made, and a new bond given by the person elected.

Code, s. 3357; 1868-9, c. 270, s. 74.

254a. Treasurer's clerks. The clerks in the treasurer's office shall enter into good and sufficient bonds, payable to the state of North Carolina, in the following sums: The chief clerk, ten thousand dollars, the other clerks, except the clerk charged with the stenographic duties, five thousand dollars each, conditioned upon the faithful performance of the duties of their respective offices, and the faithful accounting for all monies and things of value, which may come into their hands by virtue or color of their respective offices. These several bonds shall be in addition and cumulative to the official bond of the state treasurer, and shall not be construed to affect in any way the liability of the state treasurer upon his official bond. The bonds shall be approved by the treasurer and, if given in a surety company, the costs thereof, not to exceed twenty cents on the one hundred dollars of penalty, may be paid by the state.

255. Clerk of supreme court, bond and oath of office. Before undertaking his duties, the clerk of the supreme court shall enter into bond with sufficient surety payable to the state of North Carolina, in the sum of fifteen thousand dollars, conditioned for the faithful discharge of his duties and for the safe keeping of all records committed to his custody, which bond shall be lodged with the secretary of state; and he shall also before said justices, or one of them, take the oaths which are prescribed for clerks of the superior court, and shall keep his office in the city of Raleigh.

Code, s. 958; R. C., c. 33, s. 9; 1812, c. 829, s. 2; 1818, c. 963, s. 5; 1846, c. 28, s. 3; 1799, c. 520, s. 2.

256. Keeper of capitol; penalty; when renewed; where deposited. Before entering upon the duties of his office the keeper of the capitol shall execute a bond, with good security, in the sum of two hundred and fifty dollars, payable to the state of North Carolina, and conditioned for the faithful discharge of his duties. The bonds shall be deposited in the office of secretary of state, and be renewed every two years under the care of the board of public buildings; and shall be put in suit whenever in their judgment the conditions thereof, or any of them, may have been broken; and the same shall not be discharged until the whole penalty is exhausted in damages.

Code, s. 2306; R. C., c. 103, s. 6.

257. Public printer. Any person to whom may be awarded the public printing and binding shall give bond, with approved surety, payable to the state of North Carolina in the sum of five thousand dollars, conditioned for the faithful performance of his duties and undertakings under his contract. The surety herein required shall justify before some person authorized to administer oaths.

Code, s. 3621; 1899, c. 250, s. 2.

257a. Insurance commissioner. The insurance commissioner shall, before he enters upon the execution of the duties of his office, give a bond to the state in the sum of ten thousand dollars, with sufficient surety, to be approved by the state treasurer, conditioned for the faithful performance of the duties of his office during his term of office; which bond shall be deemed to extend to the faithful execution of the office of insurance commissioner by the person appointed thereto until a new appointment of insurance commissioner be made and a new bond given by the person elected.

258. Paymaster of state troops. The paymaster of the state troops shall, before he enters on the duties of his office, give bond and sufficient security, in the sum of five thousand dollars, payable to the state, for the faithful accounting of all sums of money which may come into his hands by virtue or color of his office.

Code, s. 3192; R. C., c. 70, s. 30; 1806, c. 708, s. 12.

VII. COUNTY OFFICERS.

259. Clerk of superior court. At the first meeting of the board of commissioners of each county after the election or appointment of any clerk of a superior court it shall be the duty of the clerk to deliver to such commissioners a bond with sufficient sureties, to be approved by them, in a penalty of not less than ten thousand dollars, and not more than fifteen thousand dollars, payable to the state of North Carolina, and with a condition to be void if he shall account for, and pay over, according to law, all moneys and effects which have come or may come into his hands, by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property, which have come, or may come into his possession, by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are, or thereafter shall be prescribed by law: Provided, that the bond of the clerk of the superior court of Pamlico county may be fixed at an amount not

less than five thousand dollars, in the discretion of the county commissioners.

Code, s. 72; 1899, c. 54, s. 52; 1903, c. 747; 1889, c. 7; 1891, c. 385; 1901, c. 32; C. C. P., s. 137; 1895, cc. 270, 271.

260. Clerk's bond, how approved; where deposited. The approval of said bond by the board of commissioners, or a majority of them, shall be recorded by their clerk. Any commissioner approving a bond which he knows or believes to be insufficient, or of the insufficiency of which he has reasonable notice, shall be personally liable as if he were a surety thereto. The said bond shall be acknowledged by the parties thereto, or proved by a subscribing witness, before the clerk of said board of commissioners, or their presiding officer, registered in the register's office in a separate book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safe keeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds.

Code, s. 73; C. C. P., s. 138.

261. County treasurer; penalty; when renewed. The county treasurer, before entering upon the duties of his office, shall give bond with three or more sufficient sureties, to be approved by the board of commissioners, payable to the state, conditioned that he will faithfully execute the duties of his office, and pay according to law, and on the warrant of the chairman of the board of commissioners, all moneys which shall come into his hands as treasurer, and render a just and true account thereof to the board when required by law, or by the board of commissioners. The penalty of his bond shall be a sum not exceeding the amount of the county and local taxes assessed during the previous year, and the board of commissioners at any time, by an order, may require him to renew his bond. A failure to do so within ten days after the service of such an order shall vacate his office and the board shall appoint a successor: Provided, the board of commissioners may fix the bond of the treasurer of Forsyth county at such sum as they may deem best, not less than twenty thousand dollars, and may increase it at any time; and in Craven county the bond of the treasurer shall be equal to the county funds during the preceding year, but not to exceed forty thousand dollars.

Code, s. 766; 1868-9, c. 157, s. 4; 1895, c. 270, s. 2; 1899, c. 132; 1899, c. 207, s. 4; 1903, c. 12, s. 2; 1901, c. 536; 1899, c. 54, s. 52.

262. Sheriff; number; penalty; form. The sheriff shall execute three several bonds, payable to the state of North Carolina, as fol-

lows: One conditioned for the collection and settlement of state taxes according to law, a sum not exceeding the amount of the taxes assessed upon the county for state purposes in the previous year; one conditioned for the collection and settlement of county and other local taxes according to law, in counties having no county treasurer, a sum not exceeding the amount of such county and other local taxes for the previous year; and in counties having a county treasurer, a sum not exceeding one hundred per centum of such county and other local taxes for the previous year. Every sheriff shall deposit the county and other local taxes, by him collected, with the county treasurer, if there be a county treasurer, as often as he shall collect or have in his possession at any one time of such county or local taxes, a sum equal to five hundred dollars. The amount of the third bond, for the due execution and return of process, payment of fees and moneys collected, and the faithful execution of his office as sheriff, shall be not more than five thousand dollars, in the discretion of the board of county commissioners, and shall be conditioned as follows:

The condition of the above obligation is such, that whereas the above bounden..... is elected and appointed sheriff ofcounty; if, therefore, he shall well and truly execute and due return make of all process and precepts, to him directed, and pay and satisfy all fees and sums of money, by him received or levied by virtue of any process, into the proper office into which the same, by the tenor thereof, ought to be paid, or to the person or persons to whom the same shall be due, his, her or their executors, administrators, attorneys, or agents; and in all other things well, truly and faithfully execute the said office of sheriff, during his continuance therein, then the above obligation to be void; otherwise to remain in full force and effect: Provided, the bonds of the sheriff in Craven county shall be as follows: One conditioned for the collection, payment and settlement of the county, poor, school and special taxes in a sum double the amount of said taxes for the previous year; one for the collection, payment and settlement of the public taxes as required by law in a sum double the amount of said taxes for the previous year: Provided, that the aggregate amount of the said two bonds shall not be required to exceed the sum of forty thousand dollars. And the amount of the third bond for the due execution and return of process, payment of fees and moneys collected and the faithful execution of his office as sheriff shall not be less than five thousand dollars and no more than fifteen thousand dollars in the discretion of the board of county commissioners; and whenever and as often as the sheriff shall have collected of the county, school or other local and special taxes a sum equal in amount

to three hundred dollars he shall immediately pay the same to the treasurer of the county.

Code, s. 2073; R. C., c. 105, s. 13; 1777, c. 118, s. 1; 1823, c. 1223; 1879, c. 109; 1895, c. 270, ss. 1, 2; 1899, c. 207, s. 2; 1903, c. 12; 1899, c. 54, s. 52.

263. Coroner; penalty; oath of office. Every coroner shall execute an undertaking for the faithful discharge of the duties of his office with good surety, in the sum of two thousand dollars, payable to the state of North Carolina and approved by the board of county commissioners, which he shall annually renew, or no longer hold said office. He shall also take the oaths of public officers and an oath of office.

Code, s. 661; R. C., c. 25, s. 2; 1791, c. 342, ss. 1, 2; 1820, c. 1047, ss. 1, 2; 1899, c. 54, s. 52.

264. Coroners' bonds registered. All official bonds of coroners shall be duly proved, certified, registered and filed as sheriffs' bonds are required to be; and certified copies of the same, from the register's office, shall be received and read in evidence in the like cases, and in like manner as such copies of sheriffs' bonds are now allowed to be read in evidence.

Code, s. 662; 1860-1, c. 18.

265. Register of deeds. Every register of deeds shall give bond with sufficient surety, to be approved by the board of county commissioners, in a sum not exceeding ten thousand dollars, payable to the state, and conditioned for the safe keeping of the books and records, and for the faithful discharge of the duties of his office, and shall renew his bond annually on the first Monday in December.

Code, s. 3648; 1868, c. 35, s. 3; 1876-7, c. 276, s. 5; 1899, c. 54, s. 52.

266. Constable, where registered; fees, how paid. The board of commissioners of each county shall require of each constable, elected or appointed for a township, on entering upon the duties of his office, to give a bond with good surety, payable to the state of North Carolina, in a sum not exceeding one thousand dollars, conditioned as well for the faithful discharge of his duty as constable, as for his diligently endeavoring to collect all claims put into his hands for collection, and faithfully paying over all sums thereon received, either with or without suit, unto the persons to whom the same may be due. Said bond shall be duly proved and registered, and after registration, filed in the office of the register of deeds; and certified copies of the same from the register's office shall be received and read in evidence in all actions and proceedings where the original might be. The fees for proving and registering the bond of

constable shall be paid by the constable. In Stanly county the fees shall be paid by the county.

Code, s. 647; R. C., c. 24, s. 7; 1818, c. 980; 1820, c. 1045, s. 2; 1833, c. 17; 1869-70, c. 185, s. 10; 1899, c. 54, s. 52; 1891, c. 229.

267. County surveyor. The county surveyor of each county shall enter into bond in the sum of one thousand dollars payable to the state of North Carolina, with sufficient surety for the faithful discharge of the duties of his office.

Code, s. 2762; R. C., c. 42, s. 5; 1777, c. 114, s. 13.

268. Entry-taker. Every entry-taker shall enter into bond in the sum of five hundred dollars, payable to the state, with sufficient security to be approved by the county commissioners, for the faithful discharge of the duties of his office.

Code, s. 2758; 1868-9, c. 173, s. 3.

268a. Wreck commissioner. Every person appointed a wreck commissioner shall enter into a bond, with good and sufficient surety, in the sum of two thousand dollars, payable to the state of North Carolina and conditioned for the faithful performance of his duties, which shall be approved by the board of county commissioners and deposited in the office of the clerk of the superior court.

1899, c. 79, s. 10.

269. Standard-keeper. The person elected as standard-keeper of any county shall give bond, with good and sufficient surety, payable to the state of North Carolina, in the sum of two hundred dollars, conditioned for the safe keeping of weights and measures, stamps and brands of said county, and for the faithful performance of the duties of his office.

Code, s. 3840; R. C., c. 117, s. 4; 1741, c. 32, s. 3; 1816, c. 901, s. 2; 1827, c. 22, s. 3; 1883, c. 393.

VIII. PILOTS.

270. Pilot; may be enlarged; where filed. Every person, before he obtains a commission or a branch to be a pilot, shall give bond with two sufficient sureties payable to the state of North Carolina, in the sum of five hundred dollars, with condition for the due and faithful discharge of his duties, and the duties of his apprentices; and the body appointing such pilot may, from to time, and as often as they may deem it necessary, enlarge the penalty of the bond, or require new and additional bonds to be given; and every bond taken of a pilot shall be filed with, and preserved by, the said body appointing such pilot in trust for every person that shall be injured by the

neglect or misconduct of such pilot, or his apprentices; who may severally bring suit thereon for the damage by each one sustained.

Code, s. 3487; R. C., c. 85, s. 6; 1784, c. 207, s. 3.

IX. DUTY OF COUNTY COMMISSIONERS.

271. County officials to renew bonds annually. Every clerk, treasurer, sheriff, coroner, register of deeds, surveyor, and every other officer of the several counties who is required by law to give a bond for the faithful performance of the duties of his office, shall regularly renew his official bond before the board of commissioners of the county who shall approve the same, on the first Monday of December of each year; but nothing herein shall be deemed to modify or repeal any provision of law whereby the commissioners are empowered at any time to require the sheriff, county treasurer, or other officer, to renew or justify his bonds.

Code, s. 1874; 1869-70, c. 169; 1876-7, c. 275, s. 5.

271a. Tenure of bond; examined annually; when increased. The bonds herein required shall be given for the term of the office to which such officers were chosen, respectively. They shall be carefully examined on the first Monday in December of every year, and if it shall appear that the security has been impaired, or for any cause become insufficient, to cover the amount of public money or property, or to secure the faithful performance of the duties of the office, then the bond shall be renewed or strengthened, the insufficient security increased within the limits herein prescribed, and the impaired shall be made good, but no renewal, or strengthening, or additional security shall make cumulation, or otherwise increase the penalty of said bond beyond the limits herein prescribed for the term of office.

1899, c. 54, s. 54.

272. Vacancy declared on failure to renew bond. Upon the failure of any such officer to make such regular annual renewal of his bond, it is the duty of the board of commissioners, by an order to be entered of record, to declare his office vacant, and to proceed forthwith to appoint a successor, if the power of filling the vacancy in the particular case be vested in the board of commissioners; but if otherwise, the said board shall immediately inform the proper person having the power of appointment of the fact of such vacancy.

Code, s. 1875; 1869-70, c. 169, s. 2.

273. Justification of surety on official. Every surety on an official bond required by law to be taken or renewed and approved by the board of commissioners, shall take and subscribe an oath before

the chairman of the board or some person authorized by law to administer an oath, that he is worth a certain sum (which shall be not less than one thousand dollars) over and above all his debts and liabilities and his homestead and personal property exemptions, and the sum thus sworn to shall in no case be less in the aggregate than the penalty of the bond. But nothing herein shall be construed to abridge the power of the said board of commissioners to require the personal presence of any such surety before the board when the bond is offered, or at such subsequent time as the board may fix for examination as to his financial condition or other qualifications as surety.

Code, s. 1876; 1869-70, c. 169, s. 3; 1879, c. 207; 1889, c. 7; 1891, c. 385; 1901, c. 32.

274. County commissioners to approve bonds; custody; how acknowledged. The approval of all official bonds taken or renewed by the board of commissioners shall be recorded by their clerk. Every such bond shall be acknowledged by the parties thereto or proved by a subscribing witness, before the chairman of the board of commissioners, or before the clerk of the superior court, registered in the register's office in a separate book to be kept for the registration of official bonds, and the original bond, with the approval of the commissioners endorsed thereon and certified by their chairman, shall be deposited with the clerk of the superior court, except the bond of said clerk, which shall be deposited with the register of deeds for safe keeping.

Code, s. 1877; 1869-70, c. 169, s. 4; 1879, c. 207, s. 2.

275. Clerk of board to record yeas and nays on approval; penalty for failure. It is the duty of the clerk of the board of commissioners to record in the proceedings of the board the names of those commissioners who are present at the time of the approval of any official bond, and who shall vote for such approval, and every clerk neglecting to make such record beside other punishment shall forfeit his office. Any commissioner may cause his written dissent to be entered on the records of the board.

Code, ss. 1878, 1881; 1869-70, c. 169, ss. 5, 8; R. C., c. 78, s. 7; 1790, c. 327; 1809, c. 777.

276. Commissioner liable as surety, when. Every commissioner who approves an official bond, which he knows or believes to be insufficient in the penal sum, or in the security thereof, shall be liable as if he were a surety thereto, and may be sued accordingly by any person having a cause of action on said bond.

Code, s. 1879; 1869-70, c. 169, s. 6.

277. Record of board conclusive evidence of facts stated therein on prosecution. In all actions under the preceding section, a copy of the proceedings of the board of commissioners in the particular case, certified by their clerk under his hand and seal of the county, shall be conclusive evidence of the facts in such record alleged and set forth.

Code, s. 1881; 1869-70, c. 169, s. 8.

278. Commissioners can not be sureties where they may approve. No member of the board of commissioners, or any other person authorized to take official bonds, shall sign as surety on any official bond, upon the sufficiency of which the board of which he is a member may have to pass.

Code, s. 1887; 1874-5, c. 120, s. 3.

X. DUTY SUPERIOR COURT JUDGE.

279. Official bond insufficient, new one required; office vacated for failure; successor appointed. Whenever oath shall be made before any judge of the superior court by five respectable citizens of any county within his district that after diligent inquiry made they verily believe that the bond of any officer of such county, which has been accepted by the board of commissioners, is insufficient either in the amount of the penalty or in the ability of the sureties, it shall be the duty of such judge to cause a notice to be served upon such officer requiring him to appear at some stated time and place and justify his bond by evidence other than that of himself or his sureties. And if this evidence so produced shall fail to satisfy the judge that the bond is sufficient, both in amount and the ability of the sureties, he shall give time to the officer, not exceeding twenty days, to give another bond, the judge fixing the amount of the new bond, when there is a deficiency in that particular. And upon failure to give a good bond to the satisfaction of the judge within the twenty days, he shall declare the office vacant, and if the appointment be with himself, he shall immediately proceed to fill the vacancy; and if not, he shall notify the persons having the appointing power, that they may proceed as aforesaid.

Code, s. 1885; 1874-5, c. 120.

280. Appointee to give bond; official bonds, liabilities. The person so appointed shall give bond before the judge, and the bond so given shall in all respects be subject to the requirements of the law in relation to official bonds; and all official bonds shall be considered debts and liabilities.

Code, s. 1886; 1874-5, c. 120, s. 2.

281. Judge to file statement of proceedings with commissioners. Whenever a vacancy shall be declared by the judge, he shall file a written statement of all his proceedings with the clerk of the board of commissioners, to be recorded by him.

Code, s. 1887; 1874-5, c. 120, s. 3.

XI. FIDUCIARIES.

282. Executors, administrators or collectors; penalty; condition. Every executor from whom a bond is required by law, and every administrator and collector, before letters are issued, must give a bond payable to the state, with two or more sufficient sureties, to be justified before and approved by the clerk, conditioned that such executor, administrator or collector shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other court touching the administration of the estate committed to him. The penalty of such bond must be at least double the value of all the personal property of the deceased; such value to be ascertained by the clerk by examination on oath of the applicant or of some other competent person: Provided, that if the personal property of any decedent shall be insufficient to pay his debts and the charges of administration, and it shall become necessary for his executor or administrator to apply for the sale of real estate for assets, and the bond previously given is not double the value of both the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application shall be made.

Code, s. 1388; 1870-1, c. 93; C. C. P., s. 468.

Note. See Administration, s. 29.

283. Public administrator. The public administrator shall enter into bond, with three or more sureties, approved by the clerk, in the penal sum of eight thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office, and obey all lawful orders of the clerk or other court touching the administration of the several estates that may come into his hands, and such bond shall be renewed every two years. Whenever the aggregate value of the real and personal property belonging to the several estates in the hands of the public administrator shall exceed the one-half of his bond, the clerk shall require him to enlarge his bond in amount so as to cover, at all times, at least the double of such aggregate.

Code, ss. 1390, 1391, 1392; 1868-9, c. 113, ss. 2, 3, 4.

Note. See Administration, s. 19.

284. Public guardian. The public guardian shall enter into bond with three or more sureties, approved by the clerk of the superior court, in the penal sum of six thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands.

Code, s. 1557; 1874-5, c. 221, s. 2.

285. Public guardian's bond enlarged. Whenever the aggregate value of the real and personal estate belonging to his several wards shall exceed one-half the bond herein required the clerk of the superior court shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian.

Code, s. 1558; 1874-5, c. 221, s. 3.

286. Guardians to give bond; condition. Every guardian of an estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. The penalty in such bond must be double, at least, the value of all personal property, and the rents and profits issuing from the real estate of the infant; which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or of any other person. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge, touching the guardianship of the estate committed to him: Provided, if on application by the guardian by petition the court or judge shall decree a sale for any of the causes set forth in section one thousand seven hundred and seventy-five of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold.

Code, s. 1574; R. C., c. 54, s. 5; 1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; 1868-9, c. 201, s. 11; 1874-5, c. 214.

287. Guardian to renew bond every three years. Every guardian shall renew his bond before the clerk of the superior court every three years during the continuance of the guardianship.

Code, s. 1581.

CHAPTER 9.

BOUNDARIES.

(Sections 288—289.)

288. May be established by special proceeding. The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the superior court of the county in which the land or any part thereof is situated.

1893, c. 22.

289. Procedure for establishing. The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. If the defendants fail to answer, judgment shall be given establishing the line according to petition. If the answer deny the location set out in the petition, the clerk shall issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the contention of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than thirty days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof: Provided, that either party may within ten days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next term of the superior court of the county for trial by a jury, when the question shall be heard de novo. When final judgment is given in this proceeding the court shall issue an order to the said surveyor to run and mark said line or lines as determined in the judgment. The surveyor shall make report including a map of the line as determined, which shall be filed with the judgment roll in the cause and entered with the judgment on the special proceedings docket. The procedure under this chapter, the jurisdiction of the court, and the right of appeal shall, in all respects, be the same as in special proceedings except as herein modified. The occupation of land shall constitute sufficient ownership for the purposes of this chapter.

1893, c. 22; 1903, c. 21.

NOTE. For additional remedy when records are burned, see s. 291.

CHAPTER 10.

BURNT AND LOST RECORDS.

(Sections 290—307.)

290. Certified copies of destroyed records received in evidence.

Whenever the office of any registry shall have been, or may be destroyed by fire or other accident, and the records and other papers thereof be burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplifications would be. Such copies, when the court shall be satisfied of their genuineness, may be ordered to be recorded or registered.

Code, s. 55.

291. Original papers may be again recorded; survey may be made by petition before clerk. All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. Whenever any conveyance of real estate, or any right or interest therein shall have been lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided for in chapter nine, or he may proceed in the following manner to establish both the boundaries and nature of his estate: He shall file his petition before the clerk of the superior court, setting forth the location and boundaries of his land, whose land it adjoins, and the estate claimed therein, and praying to have his own boundaries established, and the nature of his estate declared. All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings, and thereupon, unless they or some of them shall, by answer on oath, deny the truth of the matters alleged, or some of them, the clerk of the superior court shall order a surveyor to run and designate the boundaries of the petitioner's land, return his survey, with the plot thereof to court, which, when confirmed, shall, with the declaration of the court, as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same, next before the petitioner: Provided, that in all cases wherein the process of surveying shall be disputed, and the surveyor shall

be forbidden to proceed by any person interested, the same proceedings shall be had as under chapter nine. The petitioner shall set forth the whole substance of the conveyance as truly and specifically as he can, and if any of the persons notified shall, by answer, deny the truth thereof, the clerk of the superior court shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried, and on their verdict and the pleadings, the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed be found by the jury, and allow the registration of such judgment and declaration, which shall have the force and effect of a deed.

Code, s. 56.

292. Copies of lost wills may be admitted to probate. In all counties where the original wills on file in the office of the clerk of superior court, and will-books containing copies, have been or may be lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, and stating that said copy is a correct one, such copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills; and the proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it shall appear that said clerk has died or left the state, then his signature shall be proven by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a paper writing purporting to be his last will and testament.

Code, s. 57.

293. Certified copy of will evidence; letters testamentary granted. In any action or proceeding at law, wherein it may become necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will shall have been admitted to probate, the clerk of the superior court shall thereupon issue letters testamentary.

Code, s. 58.

294. Contents of destroyed will proved on petition before clerk. Any person desirous of establishing the contents of a will

destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief, and all persons having an interest under the same shall be made parties, and if the truth of such petition be denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge, shall be recorded as the will of the testator; any devisee or legatee shall be a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same.

Code, s. 59.

295. Destroyed judgments and proceedings perpetuated by petition in court having original jurisdiction. Every person desirous of perpetuating the contents of any destroyed judgments, orders or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safe keeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate, and if, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed.

Code, s. 60.

296. Color of title, how determined. Every person who shall have been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the state, shall be deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession shall have commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, will

make affidavit and produce such proof as shall be satisfactory to the court that the possession was rightfully taken; and if taken under a written conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original, nor any copy thereof, is in existence. Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the state, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction.

Code, s. 61.

297. Action on destroyed official bonds. Actions on official or other bonds lodged in any office which are destroyed with the registry thereof, may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity.

Code, s. 62.

298. Witness tickets destroyed, others filed. The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof.

Code, s. 63.

299. Lost conveyances, how replaced. Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance.

Code, s. 64.

300. Records of courts admissible to prove contents of deeds, wills, etc. The records of any court in or out of the state, and all transcripts of such records, and the exhibits filed therewith in any case, shall be admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits may have been informally certified; and

when offered in evidence shall have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited, were original.

Code, s. 65.

301. Copies of deeds, etc., mentioned in preceding section may be registered. The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in the preceding section, may be recorded or registered on application to the clerk of the superior court, and due proof that the original thereof was genuine.

Code, s. 66.

302. Rules for petitions under this chapter. The following rules shall be observed in petitions and motions under this chapter: The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information and belief; the instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered. All persons interested in the prayers of the petition or decree, shall be made parties. Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk of the superior court. The costs of every action under this chapter shall be paid as the court may decree. Appeals shall be allowed as in all other cases, and where the error alleged shall be an erroneous finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the supreme court, and the proper judgments directed to be entered below. And it shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices.

Code, s. 67; 1893, c. 295.

303. Records allowed under this chapter have same effect as original. The records and registries allowed by the court in pursuance of this chapter shall have the same force and effect as original records and registries.

Code, s. 68.

304. Recitals of decrees, records, etc., in deeds executed prior to destruction thereof prima facie evidence of existence. The

recitals, reference to, or mention of any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper writing, or other bona fide written evidence of title, executed prior to the destruction of the courthouse and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to execute said deed or other paper writing, shall be deemed, taken and recognized as true in fact, and shall be prima facie evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed, or paper writing, and shall be to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them.

Code, s. 69.

305. Deed prima facie evidence of records recited therein.

Such deed of conveyance, or other paper writing, executed as aforesaid, and registered according to law, shall be allowed to be read in any suit now pending or which may hereafter be instituted in any court of this state, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or reinstatement of said decree, order, judgment, or record, than is contained in this chapter.

Code, s. 70.

306. Provisions of this chapter extend to what records, etc.

This chapter shall extend to records of any court which has been, or may be destroyed by fire or otherwise, and to any deed of conveyance, paper writing, or other bona fide evidence of title executed before the destruction of said records.

Code, s. 71.

307. Certain records in Moore county presumed to have been burned. In all cases in Moore county of bonds, indentures, accounts, minutes, judgment rolls and all other records that can not be found on record or on file in the said clerk's office after diligent search therefor by the clerk of the court, and can not be otherwise accounted for, the same having been on record or file therein on or before September

fifth, one thousand eight hundred and eighty-nine, shall be presumed to have been destroyed by fire. In all cases in which said bonds, indentures, accounts, minutes, judgment rolls and other records or any part thereof have been lost or destroyed and in which it may become necessary to use the same in evidence, it shall be presumed that the same were executed, filed, audited or adjudicated, as the case may be, in due and legal form and were in all respects lawful records and documents.

1891, c. 55.

CHAPTER 11.

CIVIL PROCEDURE.

| | Sections. |
|---|-----------|
| I. Definitions, | 308—314 |
| II. General provisions, | 315—320 |
| III. Limitations, general provisions, | 321—341 |
| IV. Limitations, real property, | 342—351 |
| V. Limitations, other than real property, | 352—361 |
| VI. Parties, | 362—379 |
| VII. Venue, | 380—389 |
| VIII. Summons, | 390—410 |
| IX. Prosecution bond, | 411—415 |
| X. Joint and several debtors, | 416—420 |
| XI. Lis pendens, | 421—425 |
| XII. Complaint, | 426—430 |
| XIII. Defendant's pleadings, | 431—434 |
| XIV. Demurrer, | 435—439 |
| XV. Answer, | 440—444 |
| XVI. Reply, | 445—447 |
| XVII. Pleading, general provisions, | 448—465 |
| XVIII. Amendments, | 466—475 |
| XIX. Variance between pleading and proof, | 476—478 |
| XX. Reference, | 479—486 |
| XXI. Trial, | 487—503 |
| XXII. Issues, | 504—509 |
| XXIII. Verdict, | 510—514 |
| XXIV. Judgment, | 515—539 |
| XXV. Judgment confessed, | 540—542 |
| XXVI. Appeal, | 543—572 |
| XXVII. Execution, | 573—598 |
| XXVIII. Execution sales, | 599—609 |
| XXIX. Betterments, | 610—624 |
| XXX. Supplemental proceedings, | 625—642 |
| XXXI. Property exempt, etc., | 643—666 |
| XXXII. Special proceedings, | 667—682 |
| XXXIII. Arrest and bail, | 683—714 |
| XXXIV. Attachment, | 715—746 |
| XXXV. Claim and delivery, | 747—759 |
| XXXVI. Controversy without action, | 760—762 |
| XXXVII. Injunction, | 763—776 |

| | Sections. |
|--|-----------|
| XXXVIII. Mandamus, | 777—779 |
| XXXIX. Nuisance, | 780 |
| XL. Quo warranto, | 781—799 |
| XLI. Receivers, | 800—804 |
| XLII. Trust funds summarily protected, | 805—807 |
| XLIII. Waste, | 808—813 |
| XLIV. Compromise, | 814—818 |
| XLV. Examination of parties, | 819—827 |
| XLVI. Motions and orders, | 828—832 |
| XLVII. Notices, | 833—840 |
| XLVIII. Time, | 841—842 |

I. DEFINITIONS.

308. Remedies. Remedies in the courts of justice are divided into—

1. Actions.
2. Special proceedings.

Code, s. 125; C. C. P., s. 1.

309. Actions. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.

Code, s. 126; C. C. P., s. 2; 1868-9, c. 277, s. 2.

310. Special proceedings. Every other remedy is a special proceeding.

Code, s. 127; C. C. P., s. 3.

311. Kinds of actions. Actions are of two kinds—

1. Civil.
2. Criminal.

Code, s. 128; C. C. P., s. 4.

312 Criminal action. A criminal action is—

1. An action prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof.
2. An action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime, against his person or property.

Code, s. 129; C. C. P., s. 5; Const., Art. IV, s. 1.

313. Civil action. Every other is a civil action.

Code, s. 130; C. C. P., s. 6.

314. Court means clerk, when. In those of the following enactments which confer jurisdiction or power, or impose duties, when the words “superior court,” or “court,” in reference to a superior court are used, they mean the clerk of the superior court, unless

otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant.

Code, s. 132; C. C. P., s. 9.

NOTE. See s. 320.

II. GENERAL PROVISIONS.

315. Remedies not merged. Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other.

Code, s. 131; C. C. P., s. 7.

316. One form of action. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and there shall be hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action.

Code, s. 133; C. C. P., s. 12; Const., Art. IV, s. 1.

317. Parties known as plaintiff and defendant. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

Code, s. 134; C. C. P., s. 13.

318. How party may appear. A party may appear in actions or proceedings in which he is concerned either in person or by attorney.

Code, s. 109; C. C. P., s. 423.

319. Feigned issues abolished. Feigned issues are abolished, and instead thereof, in the cases where the power formerly existed to order a feigned issue, or when a question of fact not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made by the judge, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

Code, s. 135; C. C. P., s. 15.

320. Jurisdiction of clerk on procedure. The clerk of the superior court shall have jurisdiction to hear and decide all questions of practice and procedure in this court, and all other matters whereof jurisdiction is given to the superior court, unless the judge of said court, or the court at a regular term thereof, be expressly referred to.

Code, s. 251; C. C. P., s. 108.

NOTE. See s. 314.

III. LIMITATIONS; GENERAL PROVISIONS.

321. When action commenced. An action is commenced as to each defendant when the summons is issued against him.

Code, s. 161; C. C. P., s. 40.

322. Run from cause of action accrued; objection taken by answer. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited, can only be taken by answer.

Code, s. 138; C. C. P., s. 17.

323. Deemed pleaded by insane party. On the trial of any action or special proceeding to which an insane person has been made a party, such insane person shall be deemed to have pleaded specially any defense, and shall on trial have the benefit of any defense, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of this chapter. And the court, at any time before the action or proceeding is finally disposed of, may order the bringing in, by proper notice, of one or more of the near relatives or friends of such insane person, and may make such other order as it may deem necessary for his proper defense.

1889, c. 89, s. 2.

324. Disabilities. If a person entitled to commence an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either,

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life;

Then such person may bring his action within the times herein limited, after the disability shall be removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he shall commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter.

Code, ss. 148, 163; C. C. P., ss. 27, 142; 1899, c. 78.

325. Disability of marriage. In any action in which the defense of adverse possession is relied upon, the time computed as constitu-

ting such adverse possession shall not include any possession had against a feme covert during coverture prior to February thirteenth, one thousand eight hundred and ninety-nine.

1899, c. 78, ss. 2, 3.

326. Cumulative disabilities. When two or more disabilities shall co-exist at the time the right of action accrues, or when one disability shall supervene an existing one, the limitation shall not attach until they all be removed.

Code, ss. 149, 170; C. C. P., ss. 28, 49.

327. Disability must exist when right of action accrues. No person shall avail himself of a disability, unless it existed when his right of action accrued.

Code, s. 169; C. C. P., s. 48.

328. Defendant out of state; action begun, judgment enforced, when. If, when the cause of action accrue or judgment be rendered or docketed against any person, he shall be out of the state, action may be commenced, or judgment enforced, within the times herein respectively limited, after the return of such person into this state, and if, after such cause of action shall have accrued or judgment rendered or docketed, such person shall depart from and reside out of this state, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action, or the enforcement of such judgment. This section shall apply to all actions that have accrued and judgments rendered, transferred or docketed since the twenty-fourth day of August, one thousand eight hundred and sixty-eight.

Code, s. 162; C. C. P., s. 41; 1881, c. 258, ss. 1, 2.

329. Death before limitation expires; action by or against executor, when. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration. But if the claim upon which such cause of action is based be filed with the personal representative within the time above specified, and the same shall be admitted by him, it shall not be necessary to bring an action upon such claim

to prevent the bar: Provided, that no action shall be brought against the personal representative upon such claim after his final settlement.

Code, s. 164; C. C. P., s. 43; 1881, c. 80.

Note. See s. 90 et seq.

330. Time of stay by injunction or prohibition. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

Code, s. 167; C. C. P., s. 46.

331. Time during controversy on probate of will or granting letters. In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there be an administrator appointed during the pendency of the action, and it be provided that an action may be brought against him.

Code, s. 168; C. C. P., s. 47.

332. New action within one year after nonsuit, etc. If an action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited, or a judgment therein be reversed on appeal, or be arrested, the plaintiff, or if he die and the cause of action survive, his heir or representative, may commence a new action within one year after such nonsuit, reversal, or arrest of judgment.

Code, ss. 142, 166; C. C. P., ss. 21, 45.

333. New promise must be in writing. No acknowledgment or promise shall be received as evidence of a new or continuing contract, from which the statutes of limitations shall run unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

Code, s. 172; C. C. P., s. 51.

334. Admission by partner after dissolution, effect. No act, admission or acknowledgment by any partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitation shall have barred the same, shall be received as evidence to repel the statute, except against the partner or maker of the promissory note or bond, doing the act or making the admission or acknowledgment.

Code, s. 171; C. C. P., s. 50.

335. Undisclosed partner. The statutes of limitations prescribed by law shall apply to a civil action brought against an undisclosed partner only from the time when such partnership became known to the plaintiff.

1893, c. 151.

336. Cotenants; part barred, when. If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for the detention of, or injury thereto, any of them shall be barred of their recovery by limitation of time, the rights of the others shall not be affected thereby, but they may recover according to their right and interest, notwithstanding such bar.

Code, s. 173; C. C. P., s. 52.

337. Applicable to actions by state. The limitations prescribed by law shall apply to civil actions brought in the name of the state, or for its benefit, in the same manner as to actions by or for the benefit of private parties.

Code, s. 159; C. C. P., s. 38.

338. Action on account current. In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the latest item proved in the account on either side.

Code, s. 160; C. C. P., s. 39.

339. Not applicable to bank bills. The limitations prescribed by law shall not affect actions to enforce the payment of bills, notes or other evidences of debt; issued or put in circulation as money by moneyed corporations incorporated under the laws of the state.

Code, s. 174; C. C. P., s. 53; 1874-5, c. 170.

340. Actions against bank officers and stockholders. The limitations prescribed by law shall not affect actions against directors or stockholders of any moneyed corporation, or banking association incorporated under the laws of this state, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

Code, s. 175; C. C. P., s. 54.

341. Aliens in time of war. When a person shall be an alien subject, or a citizen of a country at war with the United States, the

time of the continuance of the war shall not be part of the period limited for the commencement of the action.

Code, s. 165; C. C. P., s. 44.

IV. LIMITATIONS, REAL PROPERTY.

342. Title against state. The state will not sue any person for, or in respect of, any real property, or the issues or profits thereof, by reason of the right or title of the state to the same—

1. When the person in possession thereof, or those under whom he claims, shall have been in the adverse possession thereof for thirty years, under known and visible lines or boundaries; which shall give a title in fee to the possessor.

2. When the person in possession thereof, or those under whom he claims, shall have been in possession under colorable title for twenty-one years, such possession having been ascertained and identified under known and visible lines or boundaries.

Code, s. 139; C. C. P., 18; R. C., c. 65, s. 2.

343. Such possession valid against claimants under state. All such possession as is described in the preceding section, under such title as is therein described, is hereby ratified and confirmed, and declared to be a good and legal bar against the entry or suit of any person, under the right or claim of the state.

Code, s. 140; C. C. P., s. 19.

344. Seven years' possession under color. When the person in possession of any real property, or those under whom he claims, shall have been possessed of the same, under known and visible lines and boundaries, and under colorable title for seven years, no entry shall be made or action sustained against such possessor, by any person having any right or title to the same, except during the seven years next after his right or title shall have descended or accrued, who in default of suing within the time aforesaid, shall be excluded from any claim thereafter to be made; and such possession, so held, shall be a perpetual bar against all persons not under disability.

Code, s. 141; C. C. P., s. 20.

Note. See s. 296.

345. Seizin within twenty years, when necessary. No action for the recovery of real property, or the possession thereof, shall be maintained, unless it appear that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of such action, unless he was under the disabilities prescribed by law.

Code, s. 143; C. C. P., s. 22.

346. Twenty years' adverse possession. No action for the recovery of real property, or the possession thereof, or the issues and profits thereof, shall be maintained when the person in possession thereof, or the defendant in such action, or those under whom he claims, shall have possessed such real property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held, shall give a title in fee to the possessor, in such property, against all persons not under disability.

Code, s. 144; C. C. P., s. 23.

347. Action after entry. No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within the time prescribed in this chapter.

Code, s. 145; C. C. P., s. 24.

348. Possession follows legal title, when. In every action for the recovery of real property, or the possession thereof, or damages for a trespass on such possession the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under, and in subordination to, the legal title, unless it appears that such premises have been held and possessed adversely to such legal title, for the time prescribed by law before the commencement of such action.

Code, s. 146; C. C. P., s. 25.

349. Tenant's possession is landlord's. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

Code, s. 147; C. C. P., s. 26.

350. No title by possession of right of way. No railroad, plank road, turnpike or canal company, shall be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which may have been condemned, or otherwise obtained for its use, as a right of way, depot, station-

house or place of landing, by any statute of limitation or by occupation of the same by any person whatever.

Code, s. 150; C. C. P., s. 29; R. C., c. 65, s. 23.

351. No title by possession of streets and highways. No person or corporation shall ever acquire any exclusive right to any part of any public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of any encroachment upon or obstruction of or occupancy of any public way it shall not be competent for any court to hold that such action is barred by any statute of limitations.

1891, c. 224.

V. LIMITATIONS, OTHER THAN REAL PROPERTY.

352. Periods prescribed. The periods prescribed for the commencement of actions, other than for the recovery of real property, shall be as set forth in this subchapter.

Code, s. 151; C. C. P., s. 30.

353. Ten years. Within ten years—

1. An action upon a judgment, or decree of any court of this state, or of the United States, or of any state or territory thereof, from the date of the rendition of said judgment or decree. But no such action shall be brought more than once, nor have the effect to continue the lien of the original judgment.

2. An action upon a sealed instrument against the principal thereto.

3. An action for the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

4. An action for the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him shall have been in possession, within ten years after the right of action accrued.

Code, s. 152; C. C. P., ss. 14, 31.

Note. For time within which power of sale in mortgage may be executed, see Conveyances, s. 990.

354. Seven years. Within seven years—

1. An action on a judgment rendered by a justice of the peace, from the date thereof.

2. By any creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law, for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor; and a creditor thus barred of a recovery against the representative of any principal debtor shall also be barred of a recovery against any surety to such debt.

Code, s. 153; C. C. P., s. 32.

355. Six years. Within six years—

1. An action upon the official bond of any public officer.

2. An action against any executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final accounts by the proper officer, and the filing of such audited account as required by law.

3. An action for injury to any incorporeal hereditament.

Code, s. 154; C. C. P., s. 33.

Note. For limitations against officers of a corporation, improper payment of dividends, etc., see Corporations.

356. Five years. Within five years—

1. No suit, action or proceeding shall be brought or maintained against any railroad company owning or operating a railroad for damages or compensation for right of way or use and occupancy of any lands by said company for use of its railroad unless such suit, action or proceeding shall be commenced within five years after said lands shall have been entered upon for the purpose of constructing said road, or within two years after said road shall be in operation.

2. No suit, action or proceeding shall be brought or maintained against any railroad company by any person for damages caused by the construction of said road, or the repairs thereto, unless such suit, action or proceeding shall be commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property.

Note. See Three Years.

1893, c. 152; 1895, c. 224; 1897, c. 339.

357. Three years. Within three years—

1. An action upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

2. An action upon a liability created by statute, other than a penalty or forfeiture, unless some other time be mentioned in the statute creating it.

3. An action for trespass upon real property. When the trespass

is a continuing one, such action shall be commenced within three years from the original trespass, and not thereafter.

4. An action for taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated.

6. An action against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.

7. An action against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

8. Fees due to any clerk, sheriff or other officer, by the judgment of a court; within three years from the time of the judgment rendered, or of the issuing of the last execution therefor.

9. An action for relief, on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake.

10. An action for the recovery of real property sold for the nonpayment of taxes, within three years after the execution of the sheriff's deed.

Code, ss. 36, 155; C. C. P., s. 34; 1895, c. 165; 1889, cc. 269, 218; 1899, c. 15; s. 71; 1901, c. 558, s. 23.

Note. For actions against bank officers, see s. 340.

In bastardy, see Bastardy, s. 227.

358. Two years. Within two years—

1. All claims against the several counties, cities and towns of this state, whether by bond or otherwise, shall be presented to the chairman of the board of county commissioners or to the chief officers of said cities and towns, as the case may be, within two years after the maturity of such claims, or the holders of such claims shall be forever barred from a recovery thereof.

2. An action to recover the penalty for usury.

Code, ss. 756, 3836; 1874-5, c. 243; 1876-7, c. 91, s. 3; 1895, c. 69.

Note. For statute giving personal representatives two years within which to settle, see ss. 142, 153.

For statute regulating conveyances by heir or devisee within two years, see s. 70.

For right of way of railroad, see ante Five Years (1).

For action on apprentice's bond, see s. 197.

For suit for redemption of land sold for taxes, see s. 2913.

359. One year. Within one year—

1. An action against a sheriff, coroner or constable, or other public officer, for a trespass under color of his office.

2. An action upon a statute, for a penalty or forfeiture, where the action is given to the state alone, or in whole or in part, to the party grieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

3. An action for libel, assault, battery or false imprisonment.

4. An action against a sheriff, or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

5. An application for a widow's year's provision.

Code, s. 156; C. C. P., s. 35; 1885, c. 96.

Note. For time within which personal representative may bring action for wrongful death, see s. 59.

For minimum limit in contract of insurance, within which to bring suit, see Insurance.

For limit of time for creditors to present claims to personal representative, and effect, see s. 93.

360. Six months. Within six months—

An action for slander.

Code, s. 157; C. C. P., s. 36.

Note. Claim against decedent disputed by personal representative, barred in six months, see s. 92.

361. All other actions, ten years. An action for relief not herein provided for must be commenced within ten years after the cause of action shall have accrued.

Code, s. 158; C. C. P., s. 37.

NOTE. Actions to try title to office, ninety days after induction into office, see s. 789.

VI. PARTIES.

362. Real party in interest; actions by assignees. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of real estate in his own name, whenever he or any grantor or other person through whom he may derive title, might maintain such action, notwithstanding the grant of such grantor or other conveyance be void, by reason of the actual possession of a person claiming under a title adverse to that of such grantor, or other person, at the time of the delivery of such grant or other conveyance. In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any setoff or other defense, existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

Code, s. 177; C. C. P., s. 55; 1874-5, c. 256.

362a. Who may sue for penalties. Where a penalty may be imposed by any law passed or hereafter to be passed, and it shall not be provided to what person the penalty is given, it may be recovered by any one who will sue for the same, and for his own use.

Code, s. 1212; R. C., c. 35, s. 47.

362b. Suits for penalties brought in name of state. Whenever any penalty shall be given by statute, and it is not prescribed in whose name suit therefor may be commenced, the same shall be brought in the name of the state.

Code, s. 1213; R. C., c. 35, s. 48.

363. Action by purchaser under judicial sale. Any person let into possession under any judicial sale confirmed, where the title may be retained as a security for the price, shall be deemed the legal owner of the premises for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession taken or continued, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit so brought shall be under the control of the court ordering the sale.

Code, s. 942; 1858-9, c. 50.

364. Action by executor or trustee. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

Code, s. 179; C. C. P., s. 57.

365. Infants, etc., sue by guardian or next friend. In actions and special proceedings whenever any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis, whether said infants, idiots, lunatics or persons non compos mentis, be residents or nonresidents of this state; said infants, idiots, lunatics or persons non compos mentis shall appear by their general or testamentary guardian, if they have any within the state; but if the action or proceeding be against such guardian, or if there be no such guardian, then said infants, lunatics or persons non compos mentis may appear by their next friend: Provided, however, that the duty of the state solicitors to prosecute in the case specified in chapter entitled Guardian shall not be affected by the provisions of this section.

Code, s. 180; 1893, c. 5; C. C. P., s. 58; 1870-1, c. 233; 1871-2, c. 95.

366. Infants, etc., defend by guardian ad litem. In all actions and special proceedings whenever any of the defendants are infants, idiots, lunatics, or persons non compos mentis, said infants, idiots, lunatics, or persons non compos mentis, shall defend by their general or testamentary guardian, if they have any within this state, whether said infants, idiots, lunatics, or persons non compos mentis, are residents or nonresidents of this state; and if said infants, idiots, lunatics, or persons non compos mentis, have no general or testamentary guardian within this state, and any of the defendants in said action or special proceeding shall have been summoned, then it shall be lawful for the court, wherein said action or special proceeding is pending, upon motion of any of the parties to the said action, or special proceeding, to appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, idiots, lunatics, or persons non compos mentis, and such guardian so appointed shall, if the cause in which he is appointed be a civil action, file his answer to the complaint within the time required for other defendants, unless such time be extended by the court for good cause, and if the cause in which he is so appointed be a special proceeding, a copy of the complaint, with the summons, shall be served on said guardian ad litem, and after twenty days' notice of said summons and complaint in such special proceeding, and after answer filed as above prescribed in such civil action, the court may proceed in the cause to final judgment, and decree therein in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants, and any decree or judgment in the case shall conclude the infant, idiot, lunatic, or person non compos mentis, defendants, as effectually as if he or they had been personally summoned.

Code, s. 181; C. C. P., s. 59; 1870-1, c. 233, s. 5; 1871-2, c. 95, s. 2.

Note. See Rule 17 of Supreme Court.

367. Guardian ad litem to file answer. Whenever any guardian ad litem shall be appointed, he shall file an answer in said action or special proceeding, admitting or denying the allegations thereof; the costs and expenses of which said answer, in all applications to sell or divide the real estate of said infants, shall be paid out of the proceeds of the property, or in case of a division, shall be charged upon the land, if the sale or division shall be ordered by the court, and if not ordered in any other manner the court shall direct.

Code, s. 182; 1870-1, c. 233, s. 4.

368. Married women. When a married woman is a party, her husband must be joined with her except that,

1. When the action concerns her separate property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.

And in no case need she prosecute or defend by a guardian or next friend.

Code, s. 178; C. C. P., s. 56.

369. Who may be plaintiffs. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs except as otherwise provided.

Code, s. 183; C. C. P., s. 60.

370. Who may be defendants. Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or right of possession to real estate may be made party plaintiff or defendant, as the case may require, to any such action.

Code, s. 184; C. C. P., s. 61.

371. Several parties, how classed; action by one for a class. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or where the parties may be very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Code, s. 185; C. C. P., s. 62.

372. Persons severally liable, suit against. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff.

Code, s. 186; C. C. P., s. 63.

373. Persons jointly liable, suits against. In all cases of joint contracts of copartners in trade or others, suit may be brought and prosecuted on the same against all, or any number of the persons making such contracts.

Code, s. 187; R. C., c. 31, s. 84; 1871-2, c. 24, s. 1.

374. New parties by order of court; interpleader. The court either between the terms, or at a regular term, according to the nature

of the controversy, may determine any controversy before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not be had without the presence of other parties, the court must cause them to be brought in. And when in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject matter thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment. A defendant against whom an action is pending upon a contract or for specific real or personal property, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him, may at any time before answer, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as the court shall direct. The court, in its discretion, may make such an order.

Code, s. 189; C. C. P., s. 65.

Note. For intervention in claim and delivery, see s. 757.

For intervention in attachment, see s. 746.

375. Abatement of actions. 1. No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, except in suits for penalties, and for damages merely vindictive, marriage or other disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued, by, or against, his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action.

2. After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of a party.

3. At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months, nor exceeding one year from the granting of the order.

4. No action against a receiver of a corporation shall abate by reason of his death, but, upon suggestion of the facts on the record,

shall be continued against his successor, or against the corporation in case no new receiver be appointed.

Code, s. 188; 1901, c. 2, s. 85; C. C. P., s. 64; R. C., c. 1, s. 4; c. 46, s. 43.

376. Death of party suggested before clerk. Whenever any party to any action in the superior court shall die pending the action, the death of such party may be suggested before the clerk of the superior court where the action is pending during vacation. 1887, c. 389.

377. Clerk to summon party succeeding to rights or liabilities; answer. When the suggestion of the death of a party has been made before any clerk, it shall be the duty of such clerk to issue a summons to the party who succeeds to the rights or liabilities of the defendant commanding him to appear before him on a day to be named in said summons, which shall be at least twenty days after the service thereof, and answer the complaint, and the issue joined by the filing of the said answer shall stand for trial at the term of the superior court next following.

1887, c. 389, s. 2.

378. Clerk to notify party succeeding to rights of deceased plaintiff. When the plaintiff shall die and the suggestion of the death of a party is made, it shall be the duty of the clerk before whom the suggestion is made to issue a notice to the party succeeding to the rights of party deceased who will be necessary to the prosecution of the action to final judgment to appear and become party plaintiff, and in the event the party made plaintiff shall file an amended complaint, then the defendant shall have twenty days after notice of the amended complaint being filed in which to file an answer thereto, and the issue thus made up shall stand for trial at the succeeding term.

1887, c. 389, s. 3.

Note. For substitution of administrator d. b. n., see s. 152.

NOTE. State is plaintiff in actions on official bonds and securities, see ss. 247, 248.

VII. VENUE.

380. Place of subject of action. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by law:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

2. For the partition of real property.
3. For the foreclosure of a mortgage of real property.
4. For the recovery of personal property.

Code, s. 190; 1889, c. 219; C. C. P., s. 66.

Note. For venue in partition proceedings, see s. 2487.

381. Where cause of action arose. Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial, in the cases provided by law:

1. For the recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such sound, bay, river, or other body of water, and opposite to the place where the offense was committed.

2. Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid, shall do anything touching the duties of such officer.

Code, s. 191; C. C. P., s. 67.

382. Official bonds, executors and administrators. All actions upon official bonds or against executors and administrators in their official capacity, shall be instituted in the county where the bonds shall have been given, if the principal or any of the sureties on the bond is in the county; if not, then in the plaintiff's county.

Code, s. 193; 1868-9, c. 258.

383. Domestic corporations. For the purpose of suing and being sued the principal place of business of a domestic corporation shall be its residence.

1903, c. 806.

384. Foreign corporations. An action against a corporation created by or under the laws of any other state, government, or country, may be brought in the superior court of any county in which the cause of action arose, or in which it usually did business, or in which it has property, or in which the plaintiffs, or either of them, shall reside, in the following cases:

1. By a resident of this state, for any cause of action.

2. By a plaintiff, not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state.

Code, s. 194; C. C. P., s. 361; 1876-7, c. 170.

385. Where plaintiff or defendant resides; where neither is resident. In all other cases the action shall be tried in the county in which the plaintiffs or the defendants, or any of them, shall reside at the commencement of the action; or if none of the defendants shall reside in the state, then in the county in which the plaintiffs, or any of them, shall reside; and if none of the parties shall reside within the state, then the same may be tried in any county, which the plaintiff shall designate in his summons and complaint, subject, however, to the power of the court to change the place of trial, in the cases provided by statute.

Code, s. 192; C. C. P., s. 68; 1868-9, cc. 59, 277.

386. Change of. If the county designated for that purpose, in the summons and complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose is not the proper county.

2. When the convenience of witnesses and the ends of justice would be promoted by the change.

3. When the judge shall have been, at any time, interested as party or counsel.

Code, s. 195; C. C. P., s. 69; R. C., c. 31, ss. 115, 118; 1870-1, c. 20.

387. Removal for fair trial. In all civil and criminal actions in the superior and criminal courts, in which it shall be suggested on oath, or by affirmation, on behalf of the state, or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial can not be obtained in the county in which the action shall be pending, the judge shall be authorized to order a copy of the record of said action to be removed to some adjacent county for trial, if he shall be of the opinion that a fair trial can not be had in said county, after hearing all the testimony which may be offered on either side by affidavits.

Code, s. 196; 1879, c. 45; 1899, cc. 104, 508; 1806, c. 693, s. 12.

388. Affidavits and counter affidavits; shall remove, when. No action, whether civil or criminal, shall be so removed, unless the affidavit shall set forth particularly and in detail the ground of the application. And it shall be competent for the other side to controvert the allegations of fact in said application, and to offer counter affidavits to that end. And the judge shall order the removal of

any such action if he shall be satisfied after thorough examination of the evidence as aforesaid, that the ends of justice demand it.

Code, s. 197; 1879, c. 45; 1899, c. 104, s. 2.

389. Transcript on removal; subsequent proceedings. When a cause shall be directed to be removed, the clerk shall transmit to the court to which the same is removed, a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court.

Code, ss. 195, 198; R. C., c. 31, s. 118; 1806, c. 694, s. 12; 1810, c. 787; C. C. P., s. 69.

VIII. SUMMONS.

390. Civil actions commenced by. Civil actions shall be commenced by issuing a summons; but no summons need issue in controversies submitted without action, and in confessions of judgment without action.

Code, s. 199; C. C. P., s. 70.

Note. See ss. 539, 760, 570, and *Hervey v. Edmunds*, 68 N. C., 243.

391. What to contain; where returnable. The summons shall run in the name of the state, be signed by the clerk of the superior court having jurisdiction to try the action, and shall be directed to the sheriff or other proper officer of the county in which any defendant resides or may be found. It shall be returnable to the regular term of the superior court of the county from which it issued; and shall command the sheriff, or other proper officer, to summon the defendant to appear at the next ensuing term of the superior court and answer the complaint of the plaintiff; and shall contain a notice stating in substance that if the defendant shall fail to answer the complaint within the time specified, the plaintiff will apply to the court for the relief demanded in the complaint; and shall be dated on the day of its issue.

Code, ss. 200, 213; C. C. P., 74; 1876-7, cc. 85, 241.

Note. See s. 104. •

392. When attested by seal. Every summons addressed to the sheriff or other officer of any county, other than that from which it issued, shall be attested by the seal of the court; but when it shall be addressed to the sheriff or other officer of the county in which it issued, it shall not be attested by the seal of the court.

Code, s. 203; 1876-7, c. 85, s. 4.

393. Issued to several counties. The plaintiff may issue a summons, directed to the sheriff of any county where a defendant is most likely to be found, noting on each summons that it is issued in the same action; and when the said summons is returned, it shall be docketed as if only one had issued; and if any defendant shall not be served with such process, the same proceeding shall be had as in other cases of similar process not executed.

Code, s. 204; R. C., c. 31, s. 44; 1789, c. 314, ss. 1, 2; 1831, c. 14, s. 2.

394. When officer shall execute and return. The officer to whom the summons is addressed shall note on it the day of its delivery to him, and shall execute it at least ten days before the beginning of the term to which it shall be returnable, and shall return it by the first day of the term.

Code, s. 200; 1876-7, c. 85.

395. When issued within ten days of term. If any summons shall be issued within less than ten days of the beginning of the next term of the superior court for the county in which it is issued, it shall be made returnable to the second term of said court next after the date of its issuing, and shall be executed and returned by the proper officer accordingly.

Code, s. 201; 1876-7, c. 85, s. 2.

396. Issued more than, served within, ten days of term. When the summons shall be issued more than ten days before the next succeeding term of the superior court of the county to which it is returnable, and shall be executed by the proper officer within less than ten days of said term, it shall be returned as if executed in proper time, and the case placed on the summons docket and continued to the next succeeding term, at which term it shall be treated in all respects as if said next succeeding term had been the return term thereof. But the parties to the action may, by agreement, make up the pleadings at the term to which the summons is returnable. Nothing herein contained shall be construed to release or discharge the sheriff or other officer from any liability he may incur by failing to execute the summons in due time.

Code, s. 202; 1876-7, c. 85, s. 3.

397. When summons returned to second term. Whenever it shall be necessary to serve summons, warrant of attachment, or other process by publication, and it shall appear that in order to make publication for the number of weeks required by law, sufficient time will not elapse between the order of publication and the term of court next succeeding the order, then, in all such cases, it shall not be necessary to make the summons, warrant of attachment, or other

process returnable to the term of court next succeeding, but it shall be lawful for the judge or clerk to direct that the summons, warrant of attachment, or other process shall be returnable to such other term of court, thereafter to be held, as will allow the summons, warrant of attachment, or other process to be published for the number of weeks required by law so that the publication may be completed before the term of court to which such summons, warrant of attachment, or other process shall be returnable.

1903, c. 169.

398. Alias and pluries. When the defendant in a civil action or special proceeding is not served within the time within which the summons is returnable, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process.

Code, s. 205; R. C., c. 31, s. 52; 1777, c. 115, ss. 23, 71.

399. Discontinuance. A failure to keep up the chain of summonses issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance as to such party; and if a summons is served after a break in the chain, it is a new action as to such party, begun when such summons was issued.

See *Koonce v. Pelletier*, 115 N. C. R., 233.

400. Served by reading. The summons shall be served in all cases, except as hereinafter provided, by the sheriff or other officer reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service.

Code, s. 214; 1876-7, c. 241.

Note. For statute forbidding service on Sunday, see chapter entitled Sunday.

401. Served by copy; corporations; infants; persons non compos. The summons shall be served by delivering a copy thereof in the following cases:

1. If the action be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof: Provided, that any person receiving or collecting moneys within this state for, or on behalf of, any corporation of this or any other state or government, shall be deemed a local agent for the purpose of this section; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein, or when the plaintiff resides in the state, or when such service can be made within the state, personally upon the president, treasurer or secretary thereof.

Note. For service on foreign corporations by service on local process agent, see Corporations, s. 1116, and Insurance.

For service on corporation for forfeiture of charter, see Corporations, s. 1072.

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian, or if there be none within the state, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee and to the defendant personally: Provided, that if the superintendent of an insane asylum, or the acting superintendent of such asylum, shall inform the sheriff or other officer who is charged with the duty of serving a summons or other judicial process, or notice, on any insane person confined in such asylum, that the summons, or process, or notice, can not be served without danger of injury to such insane person, it shall be sufficient for such officer to return said summons, process, or notice, without actual service on the insane person, but with an endorsement that it was not personally served because of such information; and when an insane person shall be confined in a common jail it shall be sufficient for an officer charged with service of a notice, summons, or other judicial process, to return the same with the endorsement that it was not served because of similar information as to the danger of service on such insane person given by the physician of the county in which said jail is situated.

Code, s. 217; 1889, c. 89; C. C. P., s. 82; 1874-5, c. 168.

402. Irregular service on infants, etc., validated. In any and all civil actions and special proceedings pending on the fourteenth day of March, one thousand eight hundred and seventy-nine, or theretofore determined, in any of the courts, wherein any or all of the defendants were infants, idiots, lunatics or persons non compos mentis, on whom there was no personal service of the summons, the proceedings, actions, decrees and judgments taken, had and made by such courts in such civil actions and special proceedings shall be valid, effectual and binding against and upon such infants, idiots, lunatics and persons non compos mentis, and their rights and estates in like manner, as if they had been personally served with a summons therein: Provided, that this section shall not have the effect, nor be construed, to prevent any of the proceedings, actions, judgments or decrees hereby rendered regular and confirmed, from being impeached and set aside for fraud.

Code, s. 387; 1879, c. 257; 1880, c. 23.

403. Served by publication. Where the person on whom the service of the summons is to be made can not, after due diligence, be

found within the state, and that fact appears by affidavit to the satisfaction of the court, or to a judge thereof, and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

1. Where the defendant is a foreign corporation, and has property within the state, or the cause of action arose therein.

2. Where the defendant, being a resident of this state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein.

3. Where he is not a resident of this state, but has property therein, and the court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this state, and the defendant has, or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein.

5. Where the action is for divorce, and in all cases where publication is made, the complaint must be filed before the expiration of the time of publication ordered.

6. Where the stockholders of any corporation are deemed to be necessary parties to an action and their names or residences are unknown; or where the names or residences of parties interested in real estate the subject of an action are unknown, the court having jurisdiction may, upon affidavit that after due diligence the names and residence of such parties can not be ascertained, authorize service by publication: Provided, that the name of at least one of the parties to the action and interested in the subject matter thereof shall be known and he be a resident of the state.

7. Where in actions for the foreclosure of mortgages on real estate, if any party having any interest in, or lien upon, such mortgaged premises, is unknown to the plaintiff, and the residence of such party can not, with reasonable diligence, be ascertained by him, and such fact shall be made to appear by affidavit.

8. Where no officer or agent of a domestic corporation upon whom service can be made can, after due diligence, be found within the state, and such facts be made to appear by affidavit. This subsection shall also apply to all summonses, orders to show cause, orders and notices issued by any board of aldermen, board of town or county commissioners or by individuals.

Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334.

404. Manner of publication. The order must direct the publication in any one or two newspapers to be designated as most likely

to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for four weeks, of a notice, giving the title of the action, the purpose of the same, and requiring the defendant to appear and answer, or demur to the complaint at a time and place therein mentioned; and no publication of the summons, nor mailing of the summons and complaint, shall be deemed necessary.

Code, s. 219; 1903, c. 134; C. C. P., c. 84; 1876-7, c. 241, s. 3.

405. When service complete. In the cases in which service by publication is allowed, the summons shall be deemed served at the expiration of the time prescribed by the order of publication, and the party shall then be in court.

Code, s. 227; C. C. P., s. 88.

406. Jurisdiction acquired from service. From the time of service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.

Code, s. 229; C. C. P., s. 90.

407. Proof of service. Proof of the service of the summons or notice must be—

1. By the certificate of the sheriff or other proper officer.
2. In case of publication, the affidavit of the printer, or of his foreman or principal clerk, showing the same.
3. The written admission of the defendant.

Code, s. 228; C. C. P., s. 89.

408. Voluntary appearance by defendant. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

Code, s. 229; C. C. P., s. 90.

409. Personal service on nonresident. When the place of residence is known and the same is made to appear by affidavit, in lieu of publication in a newspaper it will be sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the papers shall, in making his return, use a form of certificate substantially as follows:

State of.....

County of.....

I,, clerk of the court of county, in the state of, which court is a court of record having a seal, which is hereto attached, do certify that, to me well known as the sheriff of said county of, who being by me duly sworn, says that as such sheriff he has full power to serve any and all legal processes issuing from the courts of said state, and that on the day of, 190., he served the summons hereto attached by reading and delivering a copy of same to, the defendant therein named.

....., sheriff,
..... county,
State of.....

Sworn to and subscribed before me, this day of 190..

....., clerk court,
County of
State of.....

[L. S.]

1891, c. 120.

410. Defense after judgment on substituted service. The defendant against whom publication is ordered, or who is served under the provisions of the preceding section, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as may be just; and if the defense be successful and the judgment or any part thereof shall have been collected or otherwise enforced, such restitution may thereupon be compelled as the court may direct; but title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.

Code, s. 220; C. C. P., s. 85.
Note. Summoned after judgment, see s. 417.

IX. PROSECUTION BONDS.

411. Plaintiff's, for costs. Before issuing the summons the clerk shall require of the plaintiff either to give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that the same shall be void if the plaintiff shall pay the defendant all such costs as the defendant shall recover of

him in the action; or to deposit a like sum with him as a security to the defendant for such costs, and in case of such deposit, he shall give to the plaintiff and to the defendant a certificate to that effect; or to file with him a written authority from some judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper.

Code, s. 209; R. C., c. 31, s. 40; C. C. P., s. 71.

Note. For bond in surety company, see chapter Bonds, s. 238, et seq.
For mortgage in lieu of bond, see chapter Bonds, ss. 232-237.

412. Suit as a pauper. Any judge or clerk of the superior court may authorize any person to sue as a pauper in their respective courts when he shall prove, by one or more witnesses, that he has a good cause of action, and shall make affidavit that he is unable to comply with the last section.

Code, s. 210; C. C. P., s. 72; 1868-9, c. 96.

Note. For effect on costs, see chapter Costs.

413. Court may assign counsel. The court to which such summons is made returnable may, at its discretion, assign to the person suing as a pauper learned counsel, who shall prosecute his action.

Code, s. 211; 1868-9, c. 96, s. 2.

414. Defendant's, for costs and damages in actions for land. In all actions for the recovery of real property or for the possession thereof, the defendant, before he is permitted to plead, answer or demur, shall execute and file in the office of the clerk of the superior court of the county wherein the suit is pending an undertaking with good and sufficient surety, in an amount to be fixed by the court, not less than two hundred dollars, to be void upon condition that the defendant pay to the plaintiff all such costs and damages as the plaintiff may recover in the action, including damages for the loss of rents and profits.

Code, s. 237; 1869-70, c. 193.

415. Defense without bond, when. The undertaking prescribed in the preceding section shall not be required if an attorney practicing in the court wherein the action is pending will certify to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant will also file an affidavit stating that he is not worth the amount of said undertaking in any property whatsoever, and is unable to give the same.

Code, s. 237; 1869-70, c. 193.

X. JOINT AND SEVERAL DEBTORS.

416. When some only of defendants are served; partners.

Where the action is against two or more defendants, and the summons is served on one or more of them, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recover judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served; or,

2. If the action be against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.

4. If the name of one or more parties shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

Code, s. 222; C. C. P., s. 87.

Note. See ante ss. 371-3.

417. Summoned after judgment, when. When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract by proceeding, as provided in the preceding section, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

Code, s. 223; C. C. P., ss. 87, 318.

418. Defense by party summoned after judgment. Any party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which may have arisen subsequently to such judgment; and may make any defense which he might have made to the action if the summons had been served

on him at the time when the same was originally commenced and such defense had been then interposed to such action.

Code, s. 224; C. C. P., s. 322.

Note. See s. 410.

419. Pleadings and proceedings same as in action. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply; and the issues may be tried and judgment may be given in the same manner as in an action and enforced by execution if necessary.

Code, s. 225; C. C. P., s. 323.

420. Pleadings verified as in actions. The answer and reply shall be verified in the like cases and manner and be subject to the same rules as the answer and reply in an action.

Code, s. 226; C. C. P., s. 324.

XI. LIS PENDENS.

421. Notice of, filed in county where land lies. In an action affecting the title to real property, the plaintiff, at the time of filing the complaint or at any time afterwards or whenever a warrant of attachment shall be issued, or at any time afterwards, the plaintiff or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief at the time of filing his answer or at any time afterwards, if the same be intended to affect real estate, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment and must contain the date of the mortgage, the parties thereto, and the time and place of registering the same.

Code, s. 229; C. C. P., s. 90.

422. Notice ineffectual unless action is prosecuted. The notice of lis pendens shall be of no avail unless it shall be followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after such filing.

Code, s. 229; C. C. P., s. 90.

423. Effect of, on subsequent purchasers. From the filing of the notice of lis pendens only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance

is subsequently executed or subsequently registered, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice; to the same extent as if he were made a party to the action. For the purposes of this section an action shall be deemed to be pending from the time of filing such notice.

Code, s. 229; C. C. P., s. 90.

424. Notice cancelled, when and how. The court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized by this subchapter to be cancelled of record, by the clerk of any county in whose office the same may have been filed or recorded; and such cancellation shall be made by an endorsement to that effect on the margin of the record, which shall refer to the order.

Code, s. 229; C. C. P., s. 90.

425. Lis pendens in Buncombe. Any party to an action desiring to claim the benefit of a notice of lis pendens in Buncombe county, whether given formally under this section or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the superior court in a docket to be kept by him, to be called "Record of Lis Pendens," which index shall contain the names of the parties to the action, where such notice, whether formal or in the pleadings is filed, the object of the action, the date of indexing and a sufficient description of the land to be affected to enable any person to locate said lands. From the time of cross indexing only shall the pendency of the action be actual or constructive notice to subsequent purchasers or encumbrancers. The word "filing" in the preceding sections of this title when referring to Buncombe county shall read "cross-indexing." The clerk shall be entitled to a fee of twenty-five cents for indexing said notice to be paid as are other costs in the pending action.

1903, c. 472.

XII. COMPLAINT.

426. The first pleading. The first pleading on the part of the plaintiff is the complaint.

Code, s. 232; C. C. P., s. 92.

427. Time of filing. The plaintiff shall file his complaint in the clerk's office on or before the third day of the term to which the action is brought, otherwise the suit may, on motion, be dismissed at the cost of the plaintiff.

Code, ss. 206, 238; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3.

428. Contents. The complaint shall contain—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation shall be distinctly numbered.

3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof must be stated.

Code, s. 233; C. C. P., s. 93.

429. In action to recover purchase money of land. In actions for the recovery of a debt contracted for the purchase of land, it shall be the duty of the plaintiff to set forth in his complaint that the consideration of the debt sued on was the purchase money of certain land, describing said land in an intelligible manner, such as the number of acres, how bounded, and where situated.

Code, s. 234; 1879, c. 217.

430. What causes of action may be joined. The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of—

1. The same transaction; or transaction connected with the same subject of action.

2. Contract, express or implied; or,

3. Injuries with or without force to person and property, or to either; or,

4. Injuries to character; or,

5. Claims to recover real property, with or without damages for the withholding thereof; and the rents and profits of the same; or,

6. Claims to recover personal property, with or without damages for the withholding thereof; or,

7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action so united must all belong to one of these classes, and except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. In actions to foreclose mortgages, the court shall have power to adjudge and direct the payment by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the cove-

nant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises, against such other person, and may enforce such judgment as in other cases.

Code, s. 267; C. C. P., s. 126.

NOTE. Must show party in interest, see s. 249.

XIII. DEFENDANT'S PLEADINGS.

431. Demurrer or answer. The only pleading on the part of the defendant is either a demurrer or an answer.

Code, s. 238; C. C. P., s. 94.

432. Demurrer and answer. The defendant may demur to one or more of several causes of action stated in the complaint, and answer to the residue.

Code, s. 246; C. C. P., s. 103.

433. Sham and irrelevant defenses. Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in its discretion impose.

Code, s. 247; C. C. P., s. 104.

Note. See s. 520.

434. Time for. The defendant shall appear and demur or answer at the same term to which the summons shall be returnable, otherwise the plaintiff may have judgment by default.

Code, s. 207; 1870-1, c. 42, s. 4.

XIV. DEMURRER.

435. Grounds for. The defendant may demur to the complaint when it shall appear upon the face thereof, either—

1. That the court has no jurisdiction of the person of the defendant, or of the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same parties for the same case; or,
4. That there is a defect of parties plaintiff or defendant; or,
5. That several causes of action have been improperly united; or,
6. That the complaint does not state facts sufficient to constitute a cause of action.

Code, s. 239; C. C. P., s. 95.

436. Must specify grounds of objection. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless

it does so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

Code, s. 240; C. C. P., s. 96.

437. Sustained for misjoinder, action divided. If the demurrer be allowed for the reason that several causes of action have been improperly united, the judge shall, upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

Code, s. 272; C. C. P., s. 131.

438. Objection not appearing in complaint. When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer.

Code, s. 241; C. C. P., s. 98.

439. Objection waived. If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Code, s. 242; C. C. P., s. 99.

XV. ANSWER.

440. Contains what. The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

Code, s. 243; C. C. P., s. 100.

441. Debt for purchase money of land denied. If the defendant shall deny in his answer that the obligation sued on was for the purchase money of the land described in the complaint, it shall be the duty of the court to submit the issue so joined to the jury.

Code, s. 235; 1879, c. 217.

442. Counterclaim. The counterclaim mentioned in section four hundred and forty must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. Code, s. 244; C. C. P., s. 101.

443. Several defenses. The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been theretofore denominated legal, equitable, or both. They must each be separately stated and numbered, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished.

Code, s. 245; C. C. P., s. 102.

Note. Statute of limitations pleaded by answer only, see s. 322.

444. Contributory negligence pleaded and proved. In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial.

1887, c. 33.

XVI. REPLY.

445. When filed; cause at issue. The plaintiff shall join issue on the demurrer or reply to the answer at the same term to which such demurrer or answer may be filed; and the issues, whether of law or of fact, shall stand for trial at the next term succeeding the term at which the pleadings are completed: Provided, that where an action is instituted upon a bill, note, bill of exchange, liquidated and settled account, or for divorce, and summons in such action shall be served on the defendant at least thirty days before the term of court to which such summons shall be returnable, and a copy of the complaint filed in the clerk's office at least thirty days before such term of court, if civil cases can be tried at such, then and in such case such action shall stand for trial at such first term of court.

Code, s. 208; 1870-1, c. 42, s. 5; 1903, c. 626.

446. What to contain; demurrer to answer. When the answer contains new matter constituting a counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer; and the plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and the plaintiff may demur to one or more of such defenses or counterclaims, and reply to the residue of the counterclaim. And in other cases, when an answer

contains new matter constituting a defense by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter; and in that case, the reply shall be subject to the same rules as a reply to a counterclaim.

Code, s. 248; C. C. P., s. 105.

447. Demurrer to reply. If a reply of the plaintiff to any defense set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

Code, s. 250; C. C. P., s. 107.

XVII. PLEADING, GENERAL PROVISIONS.

448. Forms of. The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this chapter.

Code, s. 231; C. C. P., s. 91.

449. Subscribed; verified, when. Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

Code, s. 257; C. C. P., s. 116.

450. Verification. The verification must be in substance that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit.

Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.

451. Verification by agent or attorney. The affidavit may also be made by the agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party.

Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.

452. Verification by corporation; when state is party. When a corporation is a party the verification may be made by any officer,

managing or local agent thereof upon whom summons might be served; and when the state or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts.

Code, s. 258; 1901, c. 610; C. C. P., s. 117; 1868-9, c. 159, s. 7.

453. Verification before what officer. Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the superior court, notary public, in or out of the state, or justice of the peace, shall be competent to take affidavits for the verification of pleadings, in any court or county in the state, and for general purposes.

Code, s. 258; 1891, c. 140; C. C. P., s. 117; 1868-9, c. 159, s. 7.

454. Verification omitted, when; pleadings incompetent in criminal prosecutions. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading.

Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.

455. Items of account; particulars furnished, when. It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof in writing a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court or the judge thereof may order a further account when the one delivered is defective; and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished.

Code, s. 259; C. C. P., s. 118.

456. Pleadings construed. In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties.

Code, s. 260; C. C. P., s. 119.

457. Irrelevant, redundant; indefinite, uncertain. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or

defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

Code, s. 261; C. C. P., s. 120.

458. Judgments, pleaded; burden of proof. In pleading a judgment or other determination of a court or of an officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction.

Code, s. 262; C. C. P., s. 121.

459. Conditions precedent pleaded; burden of proof. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance.

Code, s. 263; C. C. P., s. 122.

460. Instrument for payment of money pleaded. In an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for the party pleading to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims.

Code, s. 263; C. C. P., s. 122.

461. Private statutes pleaded. In pleading a private statute or right derived therefrom it shall be sufficient to refer to such statute by its title or the day of its ratification, and the court shall thereupon take judicial notice thereof.

Code, s. 264; C. C. P., s. 123.

462. Libel and slander, complaint; onus. In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

Code, s. 265; C. C. P., s. 124.

Note. See Libel and Slander.

463. Libel and slander, answer. In the actions mentioned in the preceding section, the defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Code, s. 266; C. C. P., s. 125.

Note. See Libel and Slander.

464. Allegations not denied, deemed true. Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply shall for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

Code, s. 268; C. C. P., s. 127.

465. Pleading lost, copy used. If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

Code, s. 600; C. C. P., s. 357.

XVIII. AMENDMENTS.

466. As of course, when. Any pleading may be once amended of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is, or may be, docketed for trial; and if it appear to the court or judge that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court or judge may seem just.

Code, s. 272; C. C. P., s. 131.

467. Upon demurrer sustained. After the decision of a demurrer, the judge shall, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just.

Code, s. 272; C. C. P., s. 131; 1871-2, c. 173.

468. To pleading, process or proceeding, when. The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or pro-

ceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved.

Code, s. 273; C. C. P., s. 132.

469. Effect of substantial. When the complaint is so amended as to change the nature of the action and the character of the relief demanded, the judgment rendered shall not operate as an estoppel upon any person acquiring an interest in the property in controversy prior to the allowance of such amendment.

1901, c. 486.

470. Unsubstantial defects disregarded. The court and the judge thereof shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Code, s. 276; R. C., c. 3, ss. 5, 6; C. C. P., s. 135.

471. When plaintiff ignorant of defendant's name; true name inserted when known. When the plaintiff shall be ignorant of the name of a defendant such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

Code, s. 275; C. C. P., s. 134.

472. Supplemental pleadings. The plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made, and either party may set up by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of such action, determining the matter in controversy in said action, or any part thereof, and if said judgment be set up by the plaintiff, the same shall be without prejudice to any provisional remedy therefore issued or other proceedings had in said action on his behalf.

Code, s. 277; C. C. P., s. 136.

473. Time for pleading enlarged; proceedings made conformable to law. The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order

to enlarge such time; and whenever any proceeding taken by a party fails to conform to law in any respect, the judge may, in like manner and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

Code, s. 274; C. C. P., s. 133.

474. Mistake, surprise, excusable neglect. The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding.

Code, s. 274; 1893, c. 81; C. C. P., s. 133.

475. Orders without notice, vacated. An order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

Code, s. 546; C. C. P., s. 297.

XIX. VARIANCE BETWEEN PLEADING AND PROOF.

476. Material; amendment when. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice in maintaining his action upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he had been misled; and thereupon the judge may order the pleading to be amended upon such terms as shall be just.

Code, s. 269; C. C. P., s. 128.

477. Immaterial. Where the variance is not material as provided in the preceding section, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

Code, s. 270; C. C. P., s. 120.

478. Failure of proof. Where, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof.

Code, s. 271; C. C. P., s. 130.

XX. REFERENCE.

479. By consent. All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties, except in actions to annul a marriage, or for divorce and separation.

Code, s. 420; C. C. P., s. 244.

480. Compulsory. Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. Where the trial of an issue of fact shall require the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or,

2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment order into effect; or,

3. When the case involves a complicated question of boundary, or one which requires a personal view of the premises; or

4. Where a question of fact other than upon the pleadings shall arise, upon motion or otherwise, in any stage of the action; or

5. Where the issues of fact and questions of fact arise in an action of which the courts of equity of the state had exclusive jurisdiction prior to the adoption of the constitution of one thousand eight hundred and sixty-eight, and in which the matter or amount in dispute is not less than the sum or value of five hundred (\$500.00) dollars.

The compulsory reference under this section shall not deprive either party of his constitutional right to a trial of the issues of fact arising on the pleadings, by a jury, but such trial shall be had only upon the written evidence taken before the referee.

Code, s. 421; 1897, c. 237, ss. 1, 2; C. C. P., s. 245.

481. Referees, how chosen; qualifications. In all cases of reference the parties as to whom issues are joined in the action (except when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who shall be free from exception. And no person shall be appointed referee to whom all parties in the action shall object. And no judge or justice of any court shall sit as referee in any action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate.

Code, s. 423; C. C. P., s. 247.

482. Referees may administer oaths. Every referee shall have power to administer oaths in any proceeding before him, and shall have generally the power vested in a referee by law.

Code, s. 599; C. C. P., s. 356.

483. Conduct of trial; amendments; contempt punished. The trial by referees shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments and to allow amendments to any pleadings and to the summons, as the court upon such trial, upon the same terms and with like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for contempt for nonattendance or refusal to be sworn or to testify, as is possessed by the court.

Code, s. 422; C. C. P., s. 246.

484. Testimony reduced to writing. The testimony of all the witnesses on both sides shall be reduced to writing by the referee, or under his direction, and signed by the witnesses, and the evidence so taken and signed shall be filed in the cause, and constitute a part of the record.

1897, c. 237, s. 3.

485. Report, when and to whom made; review of; judgment on. The referee shall make and deliver a report within such time as may be ordered by the court. The report of the referee shall be made to the clerk of the court in which the action is pending; either party, during the term or upon ten days' notice to the adverse party out of term, may move the judge to review such report, and set aside, modify or confirm the same in whole or in part, and no judgment shall be entered on any reference except by order of the judge.

Code, s. 423; C. C. P., s. 247.

486. Report, what to contain; exceptions; effect of special verdict, when. The referee must state the facts found and the conclusions of law separately; and his decision must be given, and may be excepted to and reviewed in like manner, and with like effect in all respects as in cases of appeal; and he may in like manner settle a case or exceptions. The report of the referee upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon upon application to the judge. When the reference is to report the facts, the report shall have the effect of a special verdict.

Code, s. 422; C. C. P., s. 246.

XXI. TRIAL.

487. Defined. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

Code, s. 397; C. C. P., s. 223.

488. How issue tried. An issue of law must be tried by the judge or court, unless it be referred. An issue of fact must be tried by a jury, unless a trial by jury be waived, or a reference be ordered. Every other issue is triable by the court, or the judge thereof, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it. And when a compulsory reference is ordered either party has the right to have the issues of fact tried by a jury.

Code, ss. 398, 399; C. C. P., ss. 224, 225.

Note. For compulsory reference, see s. 480.

489. Of issues of fact. Every issue of fact joined on the pleadings, and inquiry of damages required to be tried by a jury, shall be tried at the term of the court next ensuing such joinder of issue or order for inquiry: Provided, such issue shall have been joined or order for inquiry made, more than thirty days before such term, but if not, they shall be tried at the second term after such joinder or order.

Code, s. 400; C. C. P., s. 226.

490. Continuance before term; affidavit for. Any party to an action may apply to the court in which it is pending, or to the judge thereof, after three days' notice in writing to the adverse party, to have the trial deferred to a term subsequent to that in which it is regularly triable; such application must be made thirty days before the trial term, and must be on affidavit. The court or judge may defer the trial as asked for, on such terms as shall be just, if satisfied—

1. That the applicant has used due diligence to have his case ready for trial; and,

2. That by reason of circumstances beyond his control, which he shall set forth, he can not have a fair trial at the regular trial term; if the application is made by reason of the expected absence of a witness, it shall state the name and residence of the witness, the facts expected to be proved by him, and the grounds for the expectation of his nonattendance, and that the applicant expects to procure his evidence at or before some named subsequent term. The applicant shall in all cases pay the costs of the application.

Code, s. 401; C. C. P., s. 227.

491. Continuance in term. The judge at any time during the term at which an action is triable, may postpone the trial on the application of either party, and on such terms as shall be just, if satisfied—

1. That the applicant has used due diligence to be ready for trial.
2. That he can not have a fair trial at that term, by reason of circumstances stated, and if the ground of application be the non-attendance of a witness, the affidavit shall contain the particulars required by subdivision two of the preceding section. Unless the applicant shall also set forth in his affidavit that the facts upon which his application is grounded occurred or came to his knowledge too late to allow him to apply as prescribed in the preceding section, and that his application is made as soon as it reasonably could be after the knowledge of such facts, the postponement shall not be granted, except on the terms of the payment of the costs in the action for the term.

Code, s. 402; C. C. P., s. 228; R. C., c. 31, s. 57.

492. Counter affidavits as to continuance. It shall be competent in all civil cases only for the opposing side to controvert the allegations of fact in applications for continuance, and to offer counter affidavits to that end. And the judge shall not allow such continuance unless he shall be satisfied, after thorough examination of the evidence as aforesaid, that the ends of justice demand it.

1885, c. 394.

493. Order of business. The criminal calendar shall be first disposed of, unless, by consent of counsel, or for reasons satisfactory to the judge, particular criminal actions may be deferred. The issues on the civil calendar shall be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

Code, s. 403; C. C. P., s. 229.

494. Separate trials, when. A separate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever, in its opinion, justice will thereby be promoted.

Code, s. 407; C. C. P., s. 230.

495. Judge to explain law; express no opinion on facts. No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province

of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon.

Code, s. 413; C. C. P., s. 237; R. C., c. 31, s. 130; 1796, c. 452.

496. Instructions in writing, when. Every judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, shall put his instructions in writing, and read them to the jury; he shall then sign and file them with the clerk as a part of the record of the action.

Code, s. 414; C. C. P., s. 238.

497. Written instructions in jury room, when. Whenever a judge shall put his instructions to the jury in writing either of his own will or at the request of any party to an action on trial, he shall, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury shall return said instructions with their verdict to the court.

1885, c. 137.

498. Requests for instructions. Counsel praying of the judge instructions to the jury, shall put their request in writing entitled of the cause, and sign them; otherwise the judge may disregard them. They shall be filed with the clerk as a part of the record.

Code, s. 415; C. C. P., s. 239.

499. Demurrer to evidence. When on trial of an issue of fact in a civil action, or special proceeding, the plaintiff shall have produced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment, as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal to the supreme court. If the motion is refused the defendant may except, and if the defendant introduces no evidence the jury shall pass upon the issues in the action, and the defendant shall have the benefit of his exception on appeal to the supreme court. But after the motion is refused he may waive his exception and then introduce his evidence just as if he had not made the motion. But he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except, and after the jury shall have rendered its verdict, he shall have the benefit of such latter exception on appeal to the supreme court.

1897, c. 109; 1899, c. 131; 1901, c. 594.

500. Jury trial waived, how. Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and

with the assent of the court in other actions in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent, entered in the minutes.

Code, s. 416; C. C. P., s. 240.

Note. See subchapter herein, Controversy Without Action.

501. Findings of fact and conclusions of law by judge. Upon the trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk during the court at which the trial takes place. Judgment upon the decision shall be entered accordingly.

Code, s. 417; C. C. P., s. 241.

502. Exceptions, when and how taken. 1. For the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial within ten days after the judgment, in the same manner and with the same effect as upon a trial by jury: Provided, that where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

2. And either party desiring a review, upon the evidence appearing on the trial of the questions of law, may at any time within ten days after the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge, in settling the case must briefly specify the facts found by him, and his conclusions of law.

Code, s. 418; C. C. P., s. 242.

503. Proceedings upon judgment on issue of law. On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two subdivisions of section numbered five hundred and sixteen, upon failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as provided in section numbered five hundred and seven.

Code, s. 419; C. C. P., s. 243.

XXII. ISSUES.

504. Defined. Issues arise upon the pleadings, when a material fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Code, s. 391; C. C. P., s. 219.

505. Of law. An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

Code, s. 392; C. C. P., s. 220.

506. Of fact. An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer, controverted by the reply; or,
3. Upon new matter in the reply, except an issue of law is joined thereon.

Code, s. 393; C. C. P., s. 221.

507. Which to be first tried. Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise directs.

Code, s. 394; C. C. P., s. 222.

508. When and by whom made up. The issues arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing in the action, and reduced to writing, or by the judge presiding, before or during the trial.

Code, s. 395.

509. Form. Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided, by not having too many issues.

Code, s. 396.

XXIII. VERDICT.

510. General and special. A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

Code, s. 408; C. C. P., s. 232.

511. Character of, for different actions. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes.

Code, s. 409; C. C. P., s. 233.

512. Special controls general. Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

Code, s. 410; C. C. P., s. 234.

513. Jury to assess damages, when; counterclaim. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established, beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer. If a counterclaim, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Code, s. 411; C. C. P., s. 235.

514. Entry of; motion for new trial; exceptions, when and how taken. 1. Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict.

2. If an exception be taken upon the trial, it must be reduced

to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same shall be entered in the judge's minutes and be filed with the clerk as a part of the case upon appeal.

3. If there shall be error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same shall be deemed excepted to without the filing of any formal objections.

4. The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

Code, s. 412; C. C. P., s. 236.

XXIV. JUDGMENT.

515. Defined. A judgment is either interlocutory, or the final determination of the rights of the parties in the action.

Code, s. 384; C. C. P., s. 216.

516. By default final, when. Judgment by default final may be had on failure of defendant to answer, as follows:

1. Where complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Upon proof of personal service of summons, or of service of summons by publication, on one or more of the defendants, and upon the complaint being verified, judgment shall be entered at the return term for the amount mentioned in the complaint, against the defendant or defendants, or against one or more of several defendants.

2. Where the defendant, by his answer in such action, shall not deny the plaintiff's claim, but shall set up a counterclaim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counterclaim, in like manner in any such action, upon the plaintiff's filing with the court a statement admitting such counterclaim, which statement shall be annexed to and be a part of the judgment roll.

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and

the court must thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the state, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may in its discretion require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under and by virtue of said judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense.

4. In actions for the recovery of real property, or for the possession thereof, upon the failure of the defendant to file the undertaking required by law, or upon failure of his sureties to justify according to law, unless the defendant is excused from giving such undertaking before answering.

Code, ss. 385, 390; C. C. P., s. 217; 1870-1, c. 42; 1869-70, c. 193, s. 4.

Note. On what judgment clerk calculates interest, see Interest.

517. By default and inquiry. In all other actions, except those mentioned in the preceding section, when the defendant shall fail to answer, and upon a like proof, judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account be necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court or some other fit person, and the referee shall make his report at the next succeeding term; in all other cases, the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law.

Code, s. 386.

518. By default for defendant, when. If the answer contain a statement of new matter constituting a counterclaim, and the plaintiff fail to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement; and if the case require it, an order for an inquiry of damages, by a jury may be made.

Code, s. 249; C. C. P., s. 106.

519. Rendered in vacation, when. In all cases where the superior court in vacation has jurisdiction, and all of the parties unite

in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election.

Code, s. 230; 1871-2, c. 3.

520. On frivolous pleading. If a demurrer, answer or reply be frivolous, the party prejudiced thereby may apply to the court or to the judge thereof for judgment thereon, and judgment may be given accordingly.

Code, s. 388; C. C. P., s. 218.

521. Stands until reversed. Every judgment given in a court of record having jurisdiction of the subject, shall be, and continue in force until reversed according to law.

Code, s. 935; R. C., c. 31, s. 103; 4 Hen. IV., c. 23.

522. Applicable to justice's courts. This subchapter shall apply, as near as may be, to proceedings in courts of justices of the peace.

Code, s. 389.

523. For whom and against whom given; failure to prosecute; married women. 1. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

2. And it may grant to the defendant any affirmative relief to which he may be entitled.

3. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.

4. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. In an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise.

Code, s. 424; C. C. P., s. 248.

524. How entered, party dying after verdict. In no action shall the death of either party between the verdict and the judgment be alleged for error, if such judgment be entered within two terms after the verdict.

Code, s. 938; R. C., c. 31, s. 112; 17 Charles II., c. 8.

525. Limited by demand in complaint, when. The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Code, s. 425; C. C. P., s. 249.

526. Legal title with covenants passed by, when. In any action wherein the court shall declare that a party is entitled to the possession of property, real or personal, the legal title whereof may be in another or others, parties to the suit, and the court shall order a conveyance of such legal title to him so declared to be entitled, or where, for any cause, the court shall order that one of the parties holding property in trust shall convey the legal title therein to be held in trust to another person although not a party, the court, after declaring the right and ordering the conveyance, shall have power also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that the effect thereof shall be to transfer to the party to whom the conveyance is directed to be made, the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered was in fact executed; and shall bind and entitle the parties ordered to execute or to take benefit of the conveyance, in and to all such provisions, conditions and covenants as may be adjudged to attend the conveyance, in the same manner and to the same extent as the conveyance would if the same were executed according to the order. And any party taking benefit under the judgment may have the same redress at law on account of the matter adjudged as he might on the conveyance, if the same had been executed.

Code, s. 426; R. C., c. 32, s. 24; 1850, c. 170; 1874-5, c. 17.

527. Regarded as a deed and registered, when. Every judgment, in which the transfer of title shall be so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the same rules and regulations as may be prescribed for conveyances of similar property executed by the party; and all laws which may be passed for extending the time for registration of deeds shall be deemed to include such judgments, provided the conveyance, if actually executed, would be so included.

Code, s. 427; R. C., c. 32, s. 25; 1850, c. 170, s. 2; 1874-5, c. 17, s. 2.

528. How registered. The party desiring registration of such judgment shall produce to the register a copy thereof, certified by

the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate.

Code, s. 429; R. C., c. 32, s. 27; 1850, c. 107, s. 4; 1874-5, c. 17, s. 4.

529. Certified registered copy evidence. In all legal proceedings, touching the right of parties derived under such judgment, a certified copy thereof from the register's books shall be evidence of its existence and of the matters therein contained, as fully as if the same were proved by a perfect transcript of the whole case.

Code, s. 428; R. C., c. 32, s. 26; 1850, c. 107, s. 3; 1874-5, c. 17, s. 3.

530. In action for recovery of personal property. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof, in case a delivery can not be had, and the damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return can not be had, and damages for taking and withholding the same.

Code, s. 431; C. C. P., s. 251.

531. What judge approves judgments. In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions.

Code, s. 432; 1876-7, c. 223, s. 3; 1879, c. 63; 1881, c. 51.

Note. See s. 677.

532. Judgment roll. Unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers which shall constitute the judgment roll.

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment.

Code, s. 434; C. C. P., s. 253.

533. Docketed and indexed; all of same term as of first day. Every judgment of the superior court, affecting the right to real prop-

erty, and any judgment requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of said court. The entry shall contain the names of the parties, and the relief granted, date of judgment and date of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. All judgments rendered in any county by the superior court thereof, during a term of the court, and docketed during the same term, or within ten days thereafter, shall be held and deemed to have been rendered and docketed on the first day of said term.

Code, s. 433; C. C. P., s. 252; Supm. Ct. Rule VIII.

534. When, where and how docketed; lien. Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing with the clerk thereof a transcript of the original docket, and shall be a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, shall not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith.

Code, s. 435; C. C. P., s. 254.

535. Of supreme court docketed in superior court; lien; transcript. It shall be the duty of the clerk of the supreme court, on application of the party obtaining judgment in said court, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of said judgment, setting forth the title of said court, the names of the parties thereto, the relief granted, that said judgment was so rendered by said court, the amount and date of said judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerks of the superior

court of such counties as he may be directed; and the clerk of the superior court receiving the said certificate and transcript shall docket the same in like manner as judgment rolls of the superior court may be docketed. And when so docketed, the lien of said judgment shall be the same in all respects, be subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same may be applicable. The party desiring the certificate and transcript provided for in this section, may obtain the same at any time after such judgment has been rendered, unless the supreme court shall otherwise direct.

Code, s. 436; 1881, c. 75, ss. 1, 4.

536. Federal court judgments docketed; lien. Judgments and decrees rendered in the circuit and district courts of the United States within this state may be docketed on the judgment dockets of the superior courts in the several counties of this state for the purpose of creating liens of such judgments and decrees upon property within the county where the same may be so docketed in like manner as the judgments of said superior courts may be docketed, for the purpose of creating liens upon property, but in no other manner, extent or order than as contemplated, provided and intended by the act of Congress entitled "An act to regulate the liens of judgments and decrees of the courts of the United States," approved August first, one thousand eight hundred and eighty-eight. And it shall be the duty of the clerks of the said superior courts, when a judgment roll of said circuit and district courts shall be filed with him, to docket the same as judgments of the said superior courts are required to be docketed.

1889, c. 439.

537. Judgment paid to clerk; docket credited; transcript to other counties. The party against whom any judgment for the payment of money may be rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same may have been rendered, at any time thereafter, although no execution may have issued on such judgment; and such payment of money shall be good and available to the party making the same, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county, to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judgment roll in the action.

Code, s. 438; R. C., c. 31, s. 127; 1823, c. 1212.

538. Clerk to pay money to party entitled. The clerk, to whom money shall be paid as aforesaid, shall pay the same to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution.

Code, s. 439; R. C., c. 31, s. 128; 1823, c. 1212, s. 2.

539. Credits upon judgments. Where any payment has been made on any judgment docketed in the office of the clerk of the superior court, and no entry thereof has been made on the judgment docket, or where any docketed judgment appealed from has been reversed or modified on appeal and no entry thereof has been made on such docket, any person interested therein may move in the cause before the clerk, upon affidavit after notice to all persons interested, to have such credit, reversal or modification entered; and upon the hearing before the clerk he may hear affidavits, oral testimony, depositions and any other competent evidence, and shall render his judgment; from which any party may appeal in the same manner as in appeals in special proceedings. On the trial of any issue of fact on such appeal either party may demand a jury trial, which shall be had upon the evidence before the clerk, which he shall reduce to writing. On a final judgment ordering any such credit, reversal or modification, transcript thereof shall be sent by the clerk of the superior court to each county in which the original judgment has been docketed, and the clerk of such county shall enter the same on the judgment docket of his county opposite such judgment and file the transcript. No final process shall issue on any such judgment after affidavit filed in the cause until the motion for credit, reversal or modification shall have been finally disposed of.

1903, c. 558.

NOTE. For form of judgment for purchase-money of land, see subchapter Execution, s. 585.

For estoppel of judgment after amendment, see *infra* Amendment.

XXV. JUDGMENT CONFESSED.

540. When and for what. A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this subchapter.

Code, s. 570; C. C. P., s. 325.

541. Debtor to make verified statement. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

Code, s. 571; C. C. P., s. 326.

542. Judgment; costs; execution; when due by installments.

The statement may be filed with the clerk of the superior court of the county in which the defendant resides, or if he does not reside in the state, of some county in which he has property. The clerk shall indorse upon it and enter on his judgment docket a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, shall thenceforth become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form; but shall have indorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due; and whenever any further installment becomes due, execution may, in like manner, be issued for the collection and enforcement of the same.

Code, s. 572; C. C. P., s. 327.

XXVI. APPEAL.

543. Writs of error abolished. Writs of error in civil actions are abolished; and the only mode of reviewing a judgment, or order, in civil action, shall be that prescribed by this title.

Code, s. 544; C. C. P., s. 296.

544. Certiorari, recordari and supersedeas. Writs of certiorari, recordari and supersedeas are hereby authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant

filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed, or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where the execution is stayed.

Code, s. 545; 1874-5, c. 109.

545. Who may appeal. Any party aggrieved may appeal in the cases prescribed in this chapter.

Code, s. 547; C. C. P., s. 298.

546. In what cases taken. An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

Code, s. 548; C. C. P., s. 299; 1818, c. 962, s. 4.

Note. For appeal in creditors' proceeding against personal representative, see s. 117.

547. From judge in special proceedings. Any party within ten days after notice of such judgment, may appeal to the supreme court of the state from such judgment, upon any matter of law or legal inference therein, under the regulations provided for appeals in other cases. But execution shall not be suspended until the undertakings required by law shall have been given. If issues, both of law and of fact, or issues of fact only, are raised before the clerk of the superior court, he shall transfer the case to the civil issue docket for trial of the issues at the ensuing term of the superior court.

Code, s. 256; C. C. P., s. 115.

548. Interlocutory orders reviewed on appeal from judgment. Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.

Code, s. 562; C. C. P., s. 313.

549. When taken; execution stayed, when. The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which shall be sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required.

Code, s. 549; 1889, c. 161; C. C. P., s. 300.

550. Entered on docket; case on appeal, how stated and settled; penalty on judge failing to settle. Within the time prescribed in the preceding section, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which shall be sufficient. He shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the requests of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within ten days from the entry of the appeal taken; within five days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved; if returned with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him; and the judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of such request; and at the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or if the attorneys be not present, file a copy in the office of the clerk of the court: Provided, that if the judge shall have left the district before the notice of disagreement, he may settle the case without returning to the district. In settling the case, the written instructions signed by the judge, and the written requests for instructions signed by the counsel, and the written exceptions shall be deemed conclusive as to what such instructions, requests and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter file the same with the clerk, and in case he fails to do so, the respondent may file his copy. The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the district shall have ended, and if the judge in the meantime shall have gone out of office, he shall settle the case as if he were still in office, and any judge failing to comply with this section shall be liable to a penalty of five hundred dollars, for the use of any person who will sue for the same.

Code, s. 550; 1889, c. 161; C. C. P., s. 301.

551. Clerk to prepare transcript. The clerk on receiving a copy of the case settled, as required in the preceding section, shall make

a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified to the clerk of the supreme court. The clerk, except in cases where parties are allowed to appeal without giving an undertaking on appeal, shall not be required to make the copy of the record in the case for the supreme court until the appellant shall have given the undertaking on appeal or made the deposit required.

Code, s. 551; 1889, c. 135; C. C. P., s. 302.

552. Undertaking on appeal; filed in supreme court, when. To render an appeal effectual for any purpose in any civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not to exceed the sum of two hundred and fifty dollars, to the effect that the appellant will pay all costs which may be awarded against him on the appeal; or such sum as may be ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal; such undertaking or deposit may be waived by a written consent on the part of the respondent. No appeal shall be dismissed in the supreme court on the ground that the undertaking on appeal was not filed earlier or the deposit made earlier, if the undertaking shall be filed or such deposit made before the record of the case is transmitted by the clerk of the superior court to the supreme court. And when no undertaking on appeal has been filed, or deposit made before the record of the case is transmitted to the supreme court, the supreme court shall, upon good cause being shown, on such terms as may be just, allow the appellant to file an undertaking or make the deposit.

Code, s. 552; 1889, c. 135, s. 2; C. C. P., s. 303; 1871-2, c. 31.

553. Justification of sureties. An undertaking upon an appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties within ten days after the notice of the appeal; and unless they or other sureties justify within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

Code, s. 560; C. C. P., s. 310; 1887, c. 121.

554. Undertaking to be filed with clerk. The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered. This chapter as to the security to be given upon appeals, and as to the stay of proceedings, shall apply to all appeals taken to the supreme court.

Code, s. 561; C. C. P., s. 312.

555. Notice of motion to dismiss for irregularity; new bond or deposit. Before the appellee shall be permitted to move to dismiss an appeal, either for any irregularity in the undertaking on appeal, or for failure of the sureties to justify, he shall give written notice to the appellant of such motion to dismiss at least twenty days before the district from which the cause is sent up is called, which shall state the grounds upon which the motion is based. In all such cases at least five days before the district from which the cause is sent up is called, the appellant may file with the clerk of the supreme court a new bond justified according to law. The penalty in the new bond shall be the same in amount as the penalty in the original bond, or in lieu of filing such new bond the appellant may deposit with the clerk of the supreme court a sum of money equal to the penalty in the original bond. When a new bond has been thus filed or deposit made the cause shall stand as if the bond had been duly given or deposit duly made in the court below.

1887, c. 121.

556. Appeals in forma pauperis. When any party to a civil action tried and determined in the superior court shall, at the time of trial, desire an appeal from the judgment rendered in said action to the supreme court, and shall be unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from said judgment to the supreme court as in other cases of appeal, without giving security therefor: Provided, that the party desiring to appeal from said judgment shall within five days make affidavit that he is unable by reason of his poverty to give the security required by law for said appeal, and that said party is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court in said action: Provided further, that said affidavit shall be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and that he is of opinion that the decision of the superior court, in said action, is contrary to law: Provided, that the appeal when passed upon and granted by the clerk shall be within ten days from the expiration by law of said term of court.

Code, s. 553; 1889, c. 161; 1873-4, c. 60.

557. Undertaking to stay proceedings, money demand; perishable property sold. If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment unless a written undertaking be executed on the part of the appellant, by one or more sureties, to the effect that if the judgment

appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it shall be satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs. Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking with surety or sureties, he may in lieu thereof, deposit with the officer into court as the case may require, money to the amount for which such bond or undertaking is to be given. The court in which such action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In any case where, by this section, the money is to be deposited with an officer, a judge of the court at any time upon the application of either party, may, before such deposit is made, order it to be deposited in court instead of with such officer; and a deposit made, pursuant to such order, shall be of the same effect as if made with such officer. The perfecting of an appeal by giving the undertaking mentioned in this section, shall stay proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

Code, s. 554; C. C. P., ss. 304, 311.

558. Property deposited in court to stay proceedings, when.

If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Code, s. 555; C. C. P., s. 305.

559. Conveyance executed to stay proceedings, when. If the judgment appealed from direct the execution of a conveyance or

other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

Code, s. 556; C. C. P., s. 306.

560. Proceedings stayed in possessory action and foreclosure, how. If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with one or more sureties, to the effect that, during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

Code, s. 557; C. C. P., s. 307.

561. Extent of stay; security limited for fiduciaries. Whenever an appeal is perfected as provided by this chapter it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum.

Code, s. 558; C. C. P., s. 308.

562. Undertaking in one instrument or several; served on appellee. The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made, and notice thereof given.

Code, s. 559; C. C. P., s. 309.

563. Judgment not vacated by stay of proceedings. The stay of proceedings provided for in this chapter shall not be construed

to vacate the judgment appealed from, but in all cases said judgment shall remain in full force and effect, and the lien of said judgment shall remain unimpaired notwithstanding the giving of the undertaking or making the deposit required in this chapter until the judgment appealed from is reversed or modified by the supreme court.

1887, c. 192.

564. Judgment on appeal and on undertakings; restitution.

Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the supreme court on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment shall be rendered against the appellant or person prosecuting said writ.

Code, s. 563; C. C. P., s. 314; R. C., c. 4, s. 10; 1785, c. 233, s. 2; 1810, c. 793; 1831, c. 46, s. 2.

Note. See chapter Courts-Supreme.

565. Plaintiff's cost bond on appeal from justice. When any defendant shall appeal from the judgment of a justice of the peace to the superior court, or when the judgment of such justice shall be removed by the defendant, by recordari or otherwise, to a superior court, the court having cognizance of such appeal or recordari may, upon sufficient cause shown by affidavit, compel the plaintiff to give an undertaking, with sufficient surety, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect.

Code, s. 564; R. C., c. 31, s. 104; 1831, c. 29.

566. Appeal from justice heard de novo; judgment by default, when; appeal dismissed. When an appeal shall be taken from the judgment of a justice of the peace to a superior court, the same shall be reheard by the court; whereupon an issue shall be made up and tried by a jury at the first term to which it is returned, unless continued; and judgment shall be given therein against the party cast and his sureties. And when the defendant shall make default, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, shall have judgment, and in other cases may have his inquiry of damages executed forthwith by a jury: Provided, that

if the appellant shall fail to have his appeal docketed as required by law, the appellee may, at the term of said court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant accordingly, and for the costs of appeal and against his sureties upon the undertaking, if there be any, according to the conditions thereof: Provided further, that nothing herein shall be construed to prevent the granting the writ of recordari in cases now allowed by law.

Code, s. 565; 1889, c. 443; R. C., c. 31, s. 105; 1777, c. 115, s. 63; 1794, c. 414.

567. Clerk to docket appeal from justice for trial de novo.

When the return is made the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court.

Code, s. 880; C. C. P., s. 539; 1876-7, c. 251, s. 8.

568. Appeal from justice heard on original papers. The appeal shall, in all cases, be heard on the original papers, and no copy thereof need be furnished for the use of the appellate court.

Code, s. 881; C. C. P., s. 540.

569. Appeal from the clerk. Any party may appeal from any decision of the clerk of the superior court on an issue of law or legal inference to the judge without undertaking.

Code, s. 252; C. C. P., s. 109.

570. When taken; who may take. An appeal must be taken within ten days after the entry of the order or judgment of the court; but an appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from, or who being entitled to be heard thereon, had no notice or opportunity to be heard; which fact may be shown by affidavit or other proof.

Code, s. 253; C. C. P., s. 492.

571. Duty of clerk on appeal prayed. On such appeal the clerk within three days thereafter, shall prepare a statement of the case, of his decision and of the appeal and shall sign the same; he shall, within the time aforesaid, exhibit such statement to the parties or their attorneys on request; if such statement is satisfactory, the parties or their attorneys shall sign the same; if either party object to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach such writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or

otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district for his decision.

Code, s. 254; C. C. P., s. 110.

572. Duty of judge on appeal. It shall be the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he shall have been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for such hearing, and give the attorneys of both parties reasonable notice thereof. He shall transmit his decision in writing, endorsed on, or attached to, the record to the clerk of the court, who shall immediately acknowledge the receipt thereof, and within three days after such receipt, notify the attorneys of the parties of the decision and on request and the payment of his legal fees, give them a copy thereof, and the parties receiving such notice may proceed thereafter according to law.

Code, s. 255; C. C. P., s. 113.

XXVII. EXECUTION.

573. Judgment, enforced by. Where a judgment requires the payment of money or the delivery of real or personal property the same may be enforced in those respects by execution, as provided in this subchapter. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for contempt.

Code, s. 441; C. C. P., s. 257.

574. Kinds of; signed by clerk; sealed, when. There shall be three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court.

Code, s. 442; C. C. P., s. 258.

575. Against married woman. An execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

Code, s. 443; C. C. P., s. 259.

576. Clerk to issue in six weeks; alias; penalty. The clerks of the superior court shall issue executions on all judgments rendered in their respective courts, unless otherwise directed by the plaintiff therein, within six weeks of the rendition of the judgment, and shall endorse upon the record the date of such issue; and if the executions issued are not returned satisfied to the courts to which they are made returnable, the clerks shall issue alias executions, within six weeks thereafter, unless otherwise instructed as aforesaid. And every clerk who shall fail to comply with the requirements of this section, shall be liable to be amerced in the sum of one hundred dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and shall be further liable to the party injured by suit upon his bond.

Code, s. 470; R. C., c. 45, s. 29; 1850, c. 17, ss. 1, 2, 3.

577. Within three years as of course. The party in whose favor judgment has been heretofore or shall hereafter be given, and in case of his death, his personal representatives duly appointed, may at any time within three years after the entry of judgment, proceed to enforce the same, by execution, as provided in this subchapter.

Code, s. 437; C. C. P., s. 255.

578. After three years, by leave obtained after notice. After the lapse of three years from the entry of judgment on the judgment docket, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or nonresident, or can not be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or by other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within the three years next preceding the suing for execution, and return thereof unsatisfied in whole or in part.

Code, s. 440; C. C. P., s. 256.

579. Stay of, pending appeal. Whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected, the court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as they shall see fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured

on appeal, and no execution shall issue upon such judgment during the pendency of the appeal.

Code, s. 435; 1887, c. 192; C. C. P., s. 254.

580. To what counties issued; land sold where; title passed.

When the execution is against the property of the judgment debtor it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold.

Code, s. 443; C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75.

581. Issued from and returned to court of rendition.

Executions and other process for the enforcement of judgments, shall issue only from the court in which the judgment for the enforcement of such execution, other final process, or any of them may issue, was rendered; and the returns of executions or other final process shall be made to the court of the county from which the same issued.

Code, s. 444; 1871-2, c. 74; 1881, c. 75.

582. When tested; to what term returnable. Executions shall be tested as of the term next before the day on which they were issued, and shall be returnable to the next term of the court beginning not less than forty days after the issuing thereof, and no execution against property shall issue until the end of the term during which the judgment was rendered.

Code, s. 449; 1903, c. 544; 1870-1, c. 42, s. 7; 1873-4, c. 7.

583. Against the person, when. If the action be one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the state, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the subchapter Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts be necessary to the cause of action or not.

Code, s. 447; 1891, c. 541, s. 2; C. C. P., s. 260.

Note. See s. 684.

584. Defendant dying in execution; new execution against property. Parties, at whose suit the body of any person shall be taken in execution for any judgment recovered, their executors or administrators may, after the death of the person so taken and dying in execution, have new execution against the property of the person deceased, as they might have had if such person had never been in execution.

Code, s. 469; R. C., c. 45, s. 28; 21 James I., s. 24.

585. Form of execution. The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the clerk of the court, and must intelligibly refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

Against property—no lien on personal property until levy. If it be against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor; and if sufficient personal property can not be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor shall be a lien on the personal property of such debtor, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

Against property in hands of personal representative. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

Against the person. If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment or be discharged according to law.

For delivery of specific property. If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof can not be had; and if sufficient personal property can not be found,

then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall in that respect be deemed an execution against property.

For purchase money of land. If the answer in an action for the recovery of a debt contracted for the purchase of land does not deny that the debt was so contracted, or if the jury should find that the debt was so contracted, it should be the duty of the court to have embodied in the judgment that the debt sued on was one contracted for the purchase money of said land, describing it briefly; and it shall also be the duty of the clerk to set forth in the execution, that the said debt was one contracted for the purchase of said land, the description of which shall be set out briefly as in the complaint.

Code, ss. 448, 236; C. C. P., s. 261; 1868-9, c. 148; 1879, c. 217.

586. Variance between judgment and. Whenever property may have been sold by an officer by virtue of any execution or other process commanding the sale thereof, no variance between the execution and the judgment whereon the same was issued, in the sum due in the manner in which it is due or in the time when it is due, shall invalidate or affect the title of the purchaser of such property.

Code, s. 1347; R. C., c. 44, s. 13; 1848, c. 53.

587. What may be sold under. The property, estate and effects of the judgment debtor, not exempted from sale under the constitution and laws of this state, may be levied on and sold under execution as hereinafter prescribed:

1. The goods, chattels, houses, lands, tenements and other hereditaments, and real estate belonging to him.

2. All leasehold estates of three years duration or more, owned by him.

3. The equity of redemption, and legal right of redemption, in lands, tenements, rents or other hereditaments, pledged or mortgaged by him.

4. Any lands, tenements, rents and hereditaments or any goods and chattels of which any person shall be seized or possessed in trust for him.

Code, s. 560; R. C., c. 45, ss. 1, 2, 3, 4, 5; 5 Geo. II., c. 7. s. 4; 1777, c. 115, s. 29; 1812, c. 830, ss. 1, 2; 1822, c. 1172.

Note. For statute forbidding sale of tenant's crop under execution, see s. 1978. For execution against husband's interest in wife's land, see s. 2076.

588. Sale of trust estates, purchaser's title. Upon the sale under execution of the estates mentioned in subdivision four of the preceding section the sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same

freed and discharged from all encumbrances of the person so seized or possessed in trust as aforesaid.

Code, s. 452; R. C., c. 45, s. 4; 1812, c. 830.

589. Sheriff's deed on sale of equity of redemption. The sheriff selling the equity of redemption and legal right of redemption, as set forth in section five hundred and eighty-seven, subdivision three, shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property and sale.

Code, s. 451; R. C., c. 45, s. 5; 1812, c. 830, s. 2; 1822, c. 1172.

590. Growing crops exempted from. No execution shall be levied on growing crops until the same are matured.

Code, s. 453; R. C., c. 45, s. 11; 1844, c. 35.

591. Forthcoming bond for personal property. If any sheriff or other officer who may have levied an execution or other process upon personal property, shall permit the same to remain with the possessor, such officer may take a bond for the forthcoming thereof to answer the said execution or process, which bond shall be attested by a credible witness; but the officer shall nevertheless, in all respects, remain liable as heretofore to the plaintiff's claim.

Code, s. 463; R. C., c. 45, s. 21; 1807, c. 731, s. 3; 1828, c. 12, s. 2.

592. Surety furnished list of property; possession his; sale in thirty days. When such bond shall be taken the officer shall specify therein the property levied upon, and shall furnish to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale; and the property so levied upon shall be deemed in the custody of the surety, as the bailee of the officer; and all other executions thereafter levied on said property shall create a lien on the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of said property; but the officer thereafter levying shall not take the property out of the custody of the surety: Provided, that in all such cases, sales of chattels shall take place within thirty days after the first levy; and, if sale shall not be made within the time aforesaid, any other officer who may have levied upon the property, may seize and sell the same.

Code, s. 464; R. C., c. 45, s. 22; 1844, c. 34; 1846, c. 50.

593. Summary remedy on forthcoming bond. If the condition of such bond be broken, the sheriff or other officer, on giving ten days' previous notice, in writing, to any obligor therein, may, on motion, have judgment against him in a summary manner, before the superior court, or before a justice of the peace as the case may be, of the county

in which such officer may reside, for all such damages as said officer may have sustained, or be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court or justice.

Code, s. 465; R. C., c. 45, s. 23; 1822, c. 1141.

594. Returns of, entered on judgment docket; penalty for clerk's failure. When any execution shall be returned, the return of the sheriff or other officer shall be noted by the clerk on the judgment docket; and when the same shall be returned satisfied, or partially satisfied, it shall be the duty of the clerk of the court to which the same is returned to send a copy of such last mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, whose duty it shall be to note such copy in his judgment docket, opposite said judgment, and to file said copy with the transcript of the docket of said judgment in his office. Any clerk failing to send a copy of the payments on said execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and any clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars nisi for said failure, and said conditional judgment shall be made absolute upon notice to show cause at the succeeding term of the superior court of his county.

Code, s. 445; 1871-2, c. 74, s. 2; 1881, c. 75.

595. Cost of keeping horses, etc. The court or justice shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property, the keeping of which may be chargeable to them, taken into their custody under legal process; and such allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold.

Code, s. 466; R. C., c. 45, s. 25; 1807, c. 731.

596. Verified account of expenses of keeping filed. Every such officer shall make out his account and if required shall give the debtor or his agent a copy thereof, signed by his own hand, and shall return the account with the execution or other process, under which the property has been seized or sold, to the justice or the court to whom the execution or process is returnable, and shall swear to the correctness of the several items therein set forth; otherwise he shall not be permitted to retain the same.

Code, s. 467; R. C., c. 45, s. 26; 1807, c. 731, s. 2.

597. Purchaser of defective title; remedy against defendant. Where property, real or personal, shall be sold on any execution or

decree, by any officer authorized to make the sale, and the sale is legally and in good faith made, and such property be not the property of the person against whose estate such execution or decree may have issued, by reason of which the purchaser may have been deprived of the same property, or may have been compelled to pay damages in lieu thereof to the owner; in every such case the purchaser, his executors or administrators, may sue the person against whom such execution or decree may have issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment: Provided, that such property, if the same is personal property, be present at the sale, and actually delivered to the purchaser.

Code, s. 468; R. C., c. 45, s. 27; 1807, c. 723.

598. Costs on execution paid to clerk; penalty. The sheriff or other officer shall pay the costs on all executions which shall be satisfied in whole or in part, to the clerk of the court from which the execution issued, and to no other person, on the second day of the term of the court; and any such officer making default herein shall forfeit and pay forty dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs.

Code, s. 472; R. S., c. 76, s. 5; 1822, c. 1149.

XXVIII. EXECUTION SALES.

599. How advertised; cost of newspaper publication. No real property shall be sold under execution until notice of said sale shall be posted at the courthouse door and three other public places in the county for thirty days immediately preceding such sale, and also published for four weeks in some newspaper published in the county, if a paper is published in the county: Provided, the cost of such newspaper publication shall not exceed three dollars, to be taxed as cost in the proceedings or action.

Code, s. 456; 1885, c. 38; 1868-9, c. 237, s. 10; R. C., c. 45, s. 16; 1881, c. 278.

600. Notice of, served on defendant; on governor, when. In addition to the advertisement above required, the sheriff shall in every case, at least ten days before a sale of real property under execution, serve a copy of so much of the advertisement as relates to the real property of any defendant on him personally, if he be found in the county, or on his agent, if he have a known agent therein, or if he can not be found within the county, and has no known agent therein, but his address be known, by mail to such address; and the date of service shall be ascertained by the usual course of the mail from the place where sent to the place of its address: Provided, that in case of the sale under execution, or under the order of any court, of any

property, real or personal, in which the state shall be interested as a stockholder or otherwise, notice in writing shall be served upon the governor and attorney general, at least thirty days before the sale, of the said time and place of sale, and under what process the sale is made, otherwise said sale shall be invalid.

Code, s. 457; 1868-9, c. 237, s. 11; 1876-7, c. 224.

601. Sale days under, or by order of court. All real property sold under execution, or by order of court, shall be sold at the courthouse door of the county in which the property or some part thereof is situate, on the first Monday in any month, or during the first three days of any term of the superior court of said county, unless in the order directing the sale, some other place and time is designated; and then it shall be sold as directed in such order, on any day except Sunday or holidays, after advertising the same as required by law.

Code, s. 454; 1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2.

602. Sales between ten and four o'clock. No sale under an execution or decree shall commence before ten o'clock in the morning, or continue after four o'clock in the evening, of the day on which the sale is to be made.

Code, s. 459; R. C., c. 45, s. 17; 1794, c. 47.

603. Postponed from day to day. The sheriff or other person making the sale, for the absence of bidders or any other just cause, may postpone the same from day to day, but not for more than six days in all, and upon such postponement he shall post a notice thereof on the courthouse door of his county.

Code, s. 455; 1868-9, c. 237, s. 9.

604. Postponed more than six days validated. All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in no wise be prejudiced hereby.

1901, c. 742.

605. Private acts regulating land sales, repealed. All private acts, by which lands in particular counties are required or allowed to

be sold at places, or at times, other than those hereinafter prescribed, are hereby repealed.

Code, s. 458; 1868-9, c. 237, s. 12.

606. Advertisement of sale of personal property. No sale of personal property under execution shall be made until the same has been advertised for ten days at the door of the courthouse of the county in which the same is to be sold, and at three other public places in said county, and the advertisement shall designate the place and the time of said sale.

Code, s. 460; R. C., c. 45, s. 16; 1808, c. 753; 1820, c. 1066.

607. Penalty for selling contrary to law. Any sheriff or other officer, who shall make any sale contrary to the true intent and meaning of this subchapter, shall forfeit and pay two hundred dollars to any person suing for the same, one-half for his own use and the other half to the use of the county where the offense is committed.

Code, s. 461; R. C., c. 45, s. 18; 1820, c. 1066, s. 2; 1822, c. 1153, s. 3.

608. No sale for want of bidders; officer's return; penalty. Whenever a sheriff or other officer shall return upon any execution, that he has made no sale for want of bidders, he shall state in his return the several places at which he has advertised the sale of the property levied on, and the places at which he hath offered the same for sale; and any officer failing to make such specification, shall on motion be subject to a fine of forty dollars; and every constable, for a like omission of duty, shall be subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which the execution shall be returned; or, in the case of a justice's execution, by any justice to whom the execution shall be returned: Provided, that nothing in this section, nor any recovery under the same, shall be a bar to any action for a false return against the sheriff or other officer.

Code, s. 462; R. C., c. 45, s. 19; 1815, c. 887.

609. Officer to prepare deeds for property sold. Sheriffs or other officers selling lands by authority of any execution or process, shall, upon payment of the price, prepare, execute and deliver to the purchaser a deed for the property purchased: Provided, that the purchaser of land shall furnish the officer with a description of the land.

Code, s. 471; R. C., c. 45, s. 30; 1848, c. 39.

XXIX. BETTERMENTS.

610. Petition by claimant; execution suspended; issues found.

Any defendant against whom a judgment shall be rendered for land, may, at any time before the execution of such judgment, present a petition to the court rendering the same, stating that he, or those under whom he claims, while holding the premises under a color of title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same, over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of such judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for such improvements: Provided, that in any such action, such inquiry and assessment may be made upon the trial of the cause.

Code, s. 473; 1871-2, c. 147.

611. Annual value of land and waste charged against defendant.

The jury, in assessing such damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession thereof, exclusive of the use by the tenant of the improvements thereon made by himself or those under whom he claims, and also the damages for waste, or other injury, to the premises committed by the defendant.

Code, s. 474; 1871-2, c. 147, s. 2.

612. Damages and rental value limited to three years, when.

The defendant shall not be liable for such annual value for any longer time than three years before the suit, or for damages for any such waste or other injury done before said three years, unless when he claims for improvements as aforesaid.

Code, s. 475; 1871-2, c. 147, s. 3.

613. Value of improvements estimated.

If the jury shall be satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the said premises, permanent and valuable improvements, they shall estimate in his favor, the value of such improvements as were so made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment.

Code, s. 476; 1871-2, c. 147, s. 4.

614. Improvements to balance rents. If the sum estimated for the improvements exceed the damages estimated by the jury against the defendant as aforesaid, they shall then estimate against him for any time before the said three years, the rents and profits accrued against, or damages for waste or other injury done by him, or those under whom he claims, so far as may be necessary to balance his claim for improvements; but in such case he shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements.

Code, s. 477; 1871-2, c. 147, s. 5.

615. Verdict and judgment to be for difference. After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for the improvements, if any, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict.

Code, s. 478; 1871-2, c. 147, s. 6.

616. Balance due defendant a lien. Any such balance due to the defendant shall constitute a lien upon the land recovered by the plaintiff until the same shall be paid.

Code, s. 479; 1871-2, c. 147, s. 7.

617. Recovery by plaintiff from remainderman, betterments paid. If the plaintiff claim only an estate for life in the land recovered and pay any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and shall have a lien therefor on the premises in like manner as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it be paid.

Code, s. 480; 1871-2, c. 147, s. 8.

618. Not applicable to suit by mortgagee. Nothing herein shall extend or apply to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises.

Code, s. 481; 1871-2, c. 147, s. 9.

619. Value of premises without improvements, when. When the defendant shall claim allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained.

Code, s. 482; 1871-2, c. 147, s. 10.

620. How estimated. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made on the premises by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements.

Code, s. 483; 1871-2, c. 147, s. 11.

621. Plaintiff's election that defendant take premises. The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit: Provided, he pay therefor the said value with interest in the manner in which the court may order it to be paid.

Code, s. 484; 1871-2, c. 147, s. 12.

622. Payment made to court; land sold on default. The payments shall be made to the plaintiff, or into court for his use, and the land shall be bound therefor, and if the defendant fail to make the said payments within or at the times limited therefor respectively, the court may order the land to be sold and the proceeds applied to the payment of said value and interest, and the surplus, if any, to be paid to the defendant; but if the said net proceeds be insufficient to satisfy the said value and interest, the defendant shall not be bound for the deficiency.

Code, s. 485; 1871-2, c. 147, s. 13.

623. If plaintiff is feme covert, minor or insane. If the party by or for whom the land is claimed in the suit be a feme covert, minor, or insane, such value shall be deemed to be real estate, and be disposed of as the court may consider proper for the benefit of the persons interested therein.

Code, s. 486; 1871-2, c. 147, s. 14.

624. Defendant evicted, recovery of plaintiff. If the defendant, his heirs, or assigns shall, after the premises are so relinquished to him, be evicted thereof by force of any better title than that of the original plaintiff, the person so evicted may recover from such plaintiff or his representatives, the amount so paid for the premises, as so much money had and received by such plaintiff in his life-time for the use of such persons, with lawful interest thereon from the time of such payment.

Code, s. 487; 1871-2, c. 147, s. 15.

R. S. Vol. I—11

XXX. SUPPLEMENTAL PROCEEDINGS.

625. Execution returned unsatisfied, order within three years for debtor to answer. When an execution against property of the judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the state, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment is filed, is returned unsatisfied, in whole or in part, the judgment creditor at any time after such return made, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned, or from the judge thereof, requiring such debtor to appear and answer concerning his property, before such court or judge, at a time and place specified in the order, within the county to which the execution was issued.

Code, s. 488, subsec. 1; C. C. P., s. 264; 1868-9, c. 95, s. 2.

626. Execution not returned, order on affidavit; proceedings. After the issuing of an execution against property, and upon proof by affidavit, of a party, his agent or attorney, to the satisfaction of the court, or a judge thereof, that any judgment debtor residing in the judicial district where such judge or officer resides, has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution and the judgment creditor shall be entitled to the order of examination under this and under the preceding section, although the judgment debtor may have an equitable estate in land subject to the lien of the judgment, or may have choses in action, or other things of value unaffected by the lien of the judgment, and incapable of levy.

Code, s. 488, subsec. 2; C. C. P., s. 264; 1868-9, c. 95, s. 2.

627. Proceedings against joint debtors. Proceedings supplemental to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in the like manner and to the

like effect. These provisions shall apply to all proceedings and actions pending and to those terminated by final decree or judgment.

Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245.

628. Either party may examine witnesses. On such examination either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness; and witnesses may be required to appear and testify on any proceedings under this chapter in the same manner as upon the trial of an issue.

Code, ss. 488 (subsec. 3), 491; C. C. P., ss. 264, 267; 1868-9, c. 95, s. 2.

629. Debtor leaving state, or concealing himself, arrested; held to bond. Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor leaving the state, or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such court or judge. Upon being brought before the court or judge, he may be examined on oath, and, if it then appears that there is danger of the debtor leaving the state, and that he has property which he has unjustly refused to apply to such judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt.

Code, s. 488, subsec. 4; 1868-9, c. 148, s. 4; 1868-9, c. 277, s. 8.

630. Incriminating answers, no privilege; not used in criminal prosecutions. No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a crime; but his answer shall not be used as evidence against him in any criminal proceedings or prosecution. Nor shall he be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

Code, s. 488, subsec. 5; C. C. P., s. 264; 1868-9, c. 95, s. 2.

631. Disposition of property forbidden. The court or judge may, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, or any interference therewith.

Code, ss. 488, 494, subsec. 6; C. C. P., s. 264; 1868-9, c. 95, s. 2.

632. Debtors of judgment debtor may pay off execution. After the issuing of execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Code, s. 489; C. C. P., s. 265.

633. Debtors, and persons having property, of judgment debtor, summoned. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars, the court or judge may, by an order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may also, in its or his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him or it proper.

Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245.

634. Party or witness examined under oath; certified; answer by corporation. The party or witness may be required to attend before the court or judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

Code, s. 492; C. C. P., s. 268; 1871-2, c. 245.

635. Where proceedings instituted and defendant examined. Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant shall appear and answer must be within the county where such defendant resides.

Hasty v. Simpson, 77 N. C., 69.

636. Debtor's property ordered sold; exceptions. The court or judge may order any property, whether subject or not to be sold

under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands either of himself or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, can not be so applied when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or in part by his labor.

Code, s. 493; C. C. P., s. 269; 1870-1, c. 245.

637. Receiver appointed; creditors notified. The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this chapter, of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of such receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver shall relate back to the service of the restraining order, hereinbefore and hereinafter provided for.

Code, s. 494; C. C. P., s. 270; 1870-1, c. 245; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.

Note. For statutes regulating receivers, see subchapter herein, Receivers.

638. Order of appointment filed and recorded; property vests when; receiver under control of court. Whenever the court or a judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called "book of orders, appointing receivers of judgment debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order shall have been made, and if not, from the time of the filing and recording of the order for the appointment of a

receiver. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded.

Code, s. 495; C. C. P., s. 270; 1870-1, c. 245.

639. Order of appointment recorded in county in which land lies and debtor resides. But before the receiver shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the clerk of the superior court of the county in which such judgment debtor resides.

Code, s. 496; C. C. P., s. 270.

640. Receiver to sue, debt denied, property claimed adversely; disposition forbidden. If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution, but such order may be modified or dissolved by the court or judge having jurisdiction, at any time, on such security as he shall direct.

Code, s. 497; C. C. P., s. 271; 1870-1, c. 245.

641. Reference, when. The court or judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

Code, s. 498; C. C. P., s. 272.

642. Disobedience of orders, contempt; punishment. If any person, party or witness, disobey an order of the court or judge or referee, duly served, such person, party or witness, may be punished by the judge as for a contempt. And in all cases of commitment under this subchapter, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction on such terms as may be just.

Code, s. 500; C. C. P., s. 274; 1869-70, c. 79, s. 3.

XXXI. PROPERTY EXEMPT FROM EXECUTION; ALLOTMENT.

643. When debt contracted or cause of action arose. There shall be exempt from sale under execution or other final process issued for the collection of any debt upon all judgments heretofore, or which may be hereafter rendered, such property as the judgment debtor may have been entitled to have set apart and allotted to him at the time the debt was contracted, or cause of action accrued, as follows:

Upon debts contracted prior to February twenty-fifth, one thousand eight hundred and sixty-seven.

The wearing apparel, working tools, arms for muster, one wheel and two pairs of cards, one loom, one Bible and Testament, one hymn-book, one prayer-book, and all necessary school books, the property of the defendant, shall be exempt from seizure under execution, and in addition to the foregoing articles there shall be, in favor of every housekeeper complying with this chapter, exempt from execution on debts contracted since the first day of July, one thousand eight hundred and forty-five, and prior to February twenty-fifth, one thousand eight hundred and sixty-seven, the following property, provided the same shall have been set apart before seizure, to-wit: one cow and calf, ten bushels of corn or wheat, fifty pounds of bacon, beef, or pork, or one barrel of fish, all necessary farming tools for one laborer, one bed, bedstead, and covering for every two members of the family, and such other property as the freeholders appointed for that purpose may deem necessary for the comfort and support of such debtor's family; such other property not to exceed in value the sum of fifty dollars at cash valuation: Provided, that this section shall not be extended to any person against whom judgment is obtained and execution awarded for liability incurred for failure or neglect to work on the public roads, or to muster, or pay his poll tax.

Debts contracted since February twenty-fifth, one thousand eight hundred and sixty-seven, and prior to April twenty-fourth, one thousand eight hundred and sixty-eight.

The wearing apparel, working tools, arms for muster, one wheel and two pairs of cards, one loom, one Bible and Testament, one hymn-book, one prayer-book, and all necessary school books, the property of the defendant, shall be exempt from seizure under execution. And the following property of each head of a family or housekeeper shall be exempt from execution except for taxes: All necessary farming and mechanical tools, one work horse, one yoke of oxen, one cart or wagon, one milch cow and calf, fifteen head of hogs, five hundred

pounds of pork or bacon, fifty bushels of corn, twenty bushels of wheat or rice, household and kitchen furniture not to exceed in value two hundred dollars, the libraries of licensed attorneys at law, practicing physicians and ministers of the gospel, and the instruments of surgeons and dentists used in their professions: Provided, that the value of the personal property exemptions shall not exceed five hundred dollars.

Upon debts contracted and causes of actions accrued since April the twenty-fourth, one thousand eight hundred and sixty-eight, and prior to May first, one thousand eight hundred and seventy-seven.

The property, real and personal, as set forth in article ten of the constitution of the state.

Upon debts contracted or causes of action accruing since May first, one thousand eight hundred and seventy-seven.

The property, real and personal, specified in the third subdivision of this section, and the homestead of any resident of this state shall not be subject to sale under execution or other process thereon, except such as may be rendered or issued to secure the payment of obligations contracted for the purchase of the said real estate, or for laborers' or mechanics' liens, for work done and performed for the claimant of said homestead, or for lawful taxes: Provided, that the allotment of the homestead shall, as to all property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead: Provided further, that the owners of judgments docketed since March eleventh, one thousand eight hundred and eighty-five, shall have two years from first day of April, one thousand nine hundred and one, within which to assign and set apart the homesteads under such judgments, the suspension of the statute of limitations shall be suspended not only as to the judgment under which the homestead is allotted, but as to all other judgments.

Code, s. 501; 1885, c. 359; 1887, c. 17; 1895, c. 397; 1901, c. 612; 1879, c. 256; R. C., c. 45, s. 7; 1848, c. 38; R. C., c. 45, s. 8; 1844, c. 32; 1846, c. 53; 1848, c. 38, s. 2; 1866-7, c. 61, s. 7; 1876-7, c. 253.

644. Sheriff to summon and swear appraisers; surveyor, when.

Before levying upon the real estate of any resident of this state who is entitled to a homestead under this chapter and the constitution of this state, article ten, the sheriff or other officer charged with such levy, shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest, near or remote, in the homestead exemption of C. D., and that I will faithfully

perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." Provided, that in cases where he shall deem it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds.

Code, s. 502; 1893, c. 58; 1868-9, c. 137, s. 2.

645. Duty of appraisers. The said appraisers shall thereupon proceed to value the homestead with its dwelling and buildings thereon, and lay off to said owner such portion as he may select, or to any agent, attorney, or other person in his behalf, not exceeding in value one thousand dollars, and to fix and describe the same by metes and bounds.

Code, s. 503; 1868-9, c. 137, s. 3.

646. Return of appraisers; filed and registered; copy to county of execution; original or copy evidence. They shall then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county, and said officer shall likewise make a transcript of said return over his hand and return the same without delay to the clerk of the court of the county from whence the execution issued, and said clerk shall likewise file and make minute of the same as above directed, and in all judicial proceedings the original return or a certified copy thereof may be read in evidence.

Code, s. 504; 1887, c. 272; 1868-9, c. 137, s. 4.

647. Liability of officer or appraiser conspiring. Any officer, appraiser, or assessor who shall wilfully or corruptly conspire with any judgment debtor, judgment creditor, or other person, to undervalue, or to overvalue, the homestead or personal property exemption of any debtor, or shall assign false metes and bounds, or shall make or procure to be made a false and fraudulent return thereof, shall be answerable in a civil action to the party injured thereby for all costs and damages.

Code, ss. 517, 518; 1868-9, c. 137, ss. 18, 19.

Note. For criminal liability, see Crimes.

648. Re-allotment for increase of value; appeal; statute not exclusive. Any judgment creditor of a debtor whose homestead has been allotted may apply in writing to the clerk of the superior court of the county in which such homestead lies for an order for the

re-allotment of said homestead, if there be in the hands of the sheriff of that county an execution issued from the proper court against said debtor. Such application shall be accompanied by the affidavits of three disinterested freeholders of the county in which said homestead lies, setting forth that, in their opinion, said homestead has increased in value fifty per centum or more since the last allotment thereof. Upon the filing of said application and affidavit the clerk shall issue notice to the judgment debtor to appear before him on a day not more than five days from the day of the service of said notice and show cause why said homestead shall not be re-allotted. Said notice shall state upon whose application the notice is issued. Upon the return day of said notice the said clerk shall consider the affidavit filed, as heretofore required, and such additional affidavits as may be filed by either party, and if, after hearing and considering the same, he is of opinion that the said homestead has probably appreciated in value fifty per centum or more since the last allotment, he shall command the sheriff to allot to the judgment debtor his homestead in the same manner as if no homestead had been allotted. And if upon such allotment any excess is found, it shall be disposed of by the sheriff as in ordinary cases of execution and levy. From the order of the clerk commanding a re-allotment, or refusing the same, either party may appeal to the judge holding the court of the district, or to the judge of the district, either of whom shall hear the same in chambers in any county of the judicial district to which the county in which the proceedings were instituted belongs. And in all other respects the proceedings upon such appeal shall be as now provided by law for appeals from the clerk on issues of law. This section shall not be construed to prevent the judgment creditor from resorting to the equity jurisdiction of the courts for a re-allotment of the homestead of his judgment debtor in any case.

1893, c. 149.

649. Levy on excess; return of officer. The levy may be made upon the excess of the homestead, not laid off according to this chapter, and the officer shall make substantially the following return upon the execution: "A. B., C. D., and E. F., summoned and qualified as appraisers or assessors [as the case may be] who set off to X. Y., the homestead exempt by law. Levy made upon the excess."

Code, s. 505; 1868-9, c. 137, s. 5.

650. When no election by owner, appraisers elect. In case no election is made by the owner, his agent, attorney, or any one acting in his behalf, of the homestead, to be laid off as exempt, the appraisers shall make such election for him, including always the dwelling and buildings used therewith.

Code, s. 506; 1868-9, c. 137, s. 6.

651. Tracts not contiguous included, when. Different tracts or parcels of land not contiguous may be included in the same homestead, when a homestead of contiguous land is not of the value of one thousand dollars.

Code, s. 509; 1868-9, c. 137, s. 15.

652. Personal property not to exceed \$500 appraised on demand; manner; return. Whenever the personal property of any resident of this state shall be levied upon by virtue of any execution or other final process issued for the collection of any debt, and the owner or any agent, or attorney in his behalf, shall demand that the same, or any part thereof, shall be exempt from sale under such execution, the sheriff or other officer making such levy, shall summon three appraisers, as heretofore provided, who having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he or another in his behalf, may select, and to which he may be entitled under this chapter and the constitution of the state, in no case to exceed in value five hundred dollars, which articles shall be exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption.

Code, s. 507; 1868-9, c. 137, ss. 12, 13.

653. Appraiser's oath and fees. The persons summoned to appraise the personal property exemption shall take the same oath and be entitled to the same fees as the appraisers of the homestead, and when both exemptions are claimed by the judgment debtor, at the same time, one board of appraisers shall lay off both and be entitled to but one fee.

Code, s. 508; 1868-9, c. 137, s. 14.

654. Appraisers to set apart selected property; return to register of deeds. Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he may be entitled under this chapter, not exceeding in value the sum of five hundred dollars, and make and sign a descriptive list thereof, and return the same to the register of deeds.

Code, s. 512; 1868-9, c. 137, s. 8.

655. Return registered. It shall be the duty of the register of deeds to endorse on each of said returns the date when received for registration, and to cause the same to be registered without unnecessary delay. The said register shall receive for registering the said returns the same fees that may be allowed him by law for other similar or equivalent services, which fees shall be paid by said resident applicant, his agent or attorney, upon the reception of said returns by the register.

Code, s. 513; 1868-9, c. 137, s. 9.

656. Exceptions to valuation and allotment; procedure. If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, shall be dissatisfied with the valuation and allotment of the appraisers or assessors (as the case may be) he, within ten days thereafter, or any other creditor, within six months, and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the said allotment shall be made a transcript of the return of the appraisers or assessors (as the case may be) which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return; and thereupon the said clerk shall put the same on the civil issue docket of said superior court for trial at the next term thereof as other civil actions, and such issue joined shall have precedence over all other issues at such term. And the sheriff shall not sell the excess until after the determination of said action: Provided, that the ten days and six months respectively shall begin to run from the date of the filing of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued.

Code, s. 519; 1887, c. 272, s. 2; 1883, c. 357.

657. When increase demanded; what jury shall find; commissioners appointed by court; report. When an increase of the exemption or an allotment in property other than that set apart shall be demanded, the party demanding shall in his exceptions specify the property from which the increase or re-allotment is to be had. If the appraisal or assessment shall be reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment shall be made in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by law. The commissioners, who shall be summoned by the sheriff, shall meet upon the premises and after being sworn by the sheriff or a justice of the peace to faithfully perform the duties of appraisers or assessors (as the case may be) in allotting and laying off the homestead or personal property exemption, or both (as the case may be), in accordance with the verdict and judgment aforesaid, allot and lay off the same and file their report to the next term of the

court, when the same shall be heard by the court upon exceptions thereto.

1885, c. 347.

658. Undertaking of objector. The creditor, debtor, or claimant objecting to the allotment made by the appraisers or assessors (as the case may be) under execution or petition, shall file with the clerk of the superior court an undertaking in the sum of one hundred dollars for the payment to the adverse party, of such costs as shall be adjudged against him.

Code, s. 522.

659. Set aside for fraud, complicity or irregularity. Any appraisal or allotment by appraisers or assessors, hereinbefore provided, may be set aside for fraud, complicity or other irregularity; but whenever any allotment or assessment shall be made or confirmed by the superior court at term time, as hereinbefore provided, the said homestead shall not thereafter be set aside or again laid off by any other creditor except for increase in value.

Code, s. 523.

660. Return registered; original or copy evidence. When the homestead and personal property exemption shall be decided by the court at term time the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which copy shall be registered as deeds are now registered by law; and in all judicial proceedings the original or a certified copy of said return may be introduced in evidence.

Code, s. 524.

661. Allotted upon petition of owner. Whenever any resident of this state may desire to take the benefit of the homestead and personal property exemption as guaranteed by article ten of the constitution of this state, or by this chapter, such resident, his agent or attorney, shall apply to any justice of the peace of the county in which he resides, and said justice of the peace shall appoint as assessors three disinterested persons, qualified to act as jurors, residing in said county, who shall, on notice by order of said justice, meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Code, s. 511; 1868-9, c. 137, s. 7.

662. Advertisement of petition; time of hearing. When any person entitled to a homestead and personal property exemption shall file his or her petition before a justice of the peace to have the same laid off and set apart under the preceding sections, and the said justice shall make advertisement in some newspaper published in the county, if there be one, for six successive weeks, and if there be no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of said applicant of the time and place, when and where the said petition will be heard; and the same shall not be heard nor any decree made in the cause in less than six months nor more than twelve months, from the day of making advertisement as above required.

Code, s. 515; 1868-9, c. 137, s. 11.

663. Exceptions, when allotted on petition. When the homestead or personal property exemption is made or allotted on the petition of the person entitled thereto, any creditor may, within six months from the time of said assessment or appraisal, and upon ten days' notice to the petitioner, file his objections with the register of deeds of the county in which the premises are situated, and the register of deeds shall return the same to the clerk of the superior court of said county, who shall place the same on the civil issue docket, and the same shall be tried as provided in section six hundred and fifty-six for homestead and personal property exemptions set off under execution.

Code, s. 520.

664. Allotted after death of homesteader. If any person entitled to a homestead exemption dies without such homestead having been set apart, his widow, if he leave no children, or his child or children under the age of twenty-one years, if he leave such, may proceed to have said homestead exemption laid off by petition, and if such widow, child or children, being entitled to a homestead exemption as aforesaid, shall have failed to have the same set apart in the manner hereinbefore provided, then and in such event, it shall be the duty in an action brought by the personal representative of such decedent to subject the realty of his testator or intestate to the payment of debts and charges of administration, of the court to appoint three disinterested freeholders to set apart to such widow, child or children entitled to a homestead exemption as aforesaid a homestead exemption under metes and bounds in the lands of such decedent, who shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as is now required by law for the registration of homestead exemptions.

Code, s. 514; 1893, c. 332; 1868-9, c. 137, s. 10.

665. Liability of officer failing to allot. Any officer making a levy, who shall refuse or neglect to summon and qualify appraisers as heretofore provided, or who shall fail to make due return of his proceedings, or who shall levy upon the homestead set off by said appraisers or assessors (as the case may be), except as herein provided, he and his sureties shall be liable to the owner of said homestead for all costs and damages in a civil action.

Code, s. 516; 1868-9, c. 137, s. 17.

Note. For additional penalty making misdemeanor, see Crimes.

666. Forms. The following forms shall be substantially followed in proceedings under this subchapter:

[No. 1.]

APPRAISER'S RETURN.

When the homestead is valued at less than one thousand dollars, and personal property also appraised.

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of Township, County, by C. D., sheriff, (or constable or deputy) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of and is therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed, the following articles of personal property, selected by said A. B. (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this day of 19....

| | |
|------------|---------|
| O. K. | (L. S.) |
| L. M. | (L. S.) |
| R. S. | (L. S.) |

The above return was made and subscribed in my presence, day and date above given.

C. D., (Sheriff or Constable).

[No. 2.]

Petition for homestead before a justice of the peace.

In the matter of A. B. } Before, J. P.
County.

A. B. respectfully shows that he (she or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (she or they, as the case may be) believes to be one thousand dollars, including the dwelling and buildings thereon. He (she

or they) further shows that he (she or they, as the case may be) is (or are) entitled to a personal property exemption from execution, to the value of (here state the value) consisting of the following property: (Here specify.) He (she or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

[No. 3.]

Form for appraisal of personal property exemption.

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of Township, County, and to lay off the exemption given by law thereto, by C. D., sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed the following articles of personal property selected by the said A. B., to-wit:..... which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage, to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this.....day of.....19....

O. K. (L. S.)

L. M. (L. S.)

R. S. (L. S.)

The above return was made and subscribed in my presence. day and date above given. C. D. (Sheriff or Constable).

[No. 4.]

Certificate of qualification to be endorsed on return by sheriff.

The within named B. F., G. H. and J. R. were summoned and qualified according to law, as appraisers of the exemption of the said A. B., under an execution in favor of X. Y., this day of 19.... C. D. (Sheriff).

[No. 5.]

Minute on execution docket.

X.....Y..... }
vs.
A.....B..... }

Execution issued 19....

Homestead appraised and set off and return made 19....

Code, s. 524.

XXXII. SPECIAL PROCEEDINGS.

667. This chapter applicable to. The provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided.

Code, s. 278.

Note. See s. 310.

668. How commenced. When special proceedings are had against adverse parties, they shall be commenced as is prescribed for civil actions.

Code, s. 287; 1868-9, c. 93, s. 4.

Note. See s. 675.

669. Summons in; what to contain. The summons in special proceedings shall command the officer to summon the defendant to appear at the office of the clerk of the superior court on a day named in the summons, to answer the complaint or petition of the plaintiff. The number of days within which the defendant is summoned to appear shall in no case be less than ten exclusive of the day of service.

Code, s. 279.

670. Return of summons. The officer to whom the summons is addressed, shall note on it the day of its delivery to him; if required by the plaintiff, he shall execute the same immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it.

Code, s. 280; C. C. P., s. 75.

671. Complaint filed, when. It shall be sufficient for the plaintiff to file his complaint or petition with the clerk of the court, to which the summons is returnable, at the time of issuing the summons, or within ten days thereafter.

Code, s. 281; C. C. P., s. 76; 1876-7, c. 241, s. 4.

672. Nonsuit for failure to file in time. If the plaintiff shall fail to file his complaint or petition within the time limited by the summons for the appearance and answer of the defendant, the defendant shall be entitled to demand judgment of nonsuit against the plaintiff.

Code, s. 282; C. C. P., s. 78.

673. Time enlarged. The time for filing the complaint, petition, or of any pleading whatever, may be enlarged by the court for good cause shown by affidavit, but it shall not be enlarged by more than ten additional days, nor more than once, unless the default shall have been occasioned by accident over which the party applying had no control, or by the fraud of the opposing party.

Code, s. 283; C. C. P., s. 79.

674. Equitable defenses pleaded; transferred to civil issue docket; amendments. In special proceedings which have been, or may hereafter be begun, it shall be competent for any defendant or

other party thereto to plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. It shall be competent for the trial judge to allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property with a view to substantial justice between the parties.

1903, c. 566.

675. Ex parte; begun by petition. If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded.

Code, s. 284; 1868-9, c. 93.

676. Clerk hears summarily; attorney must file authority from nonresident. In such cases, if all persons to be affected by the decree, or their attorney, shall have signed the petition, and they be of full age, the clerk of the superior court shall have power to hear the petition summarily, and to decide the same, if either or any of the petitioners shall be residing out of the state, an authority from him or them, to the attorney, in writing, must be filed with the clerk, before he shall make any order or decree to prejudice their rights.

Code, s. 285; 1868-9, c. 93, s. 2.

677. Judge approves when infants are petitioners. If any of the petitioners be an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case, and capable of being prejudicial to the infant, shall be valid, unless submitted to and approved by the judge resident in the district or the judge holding court therein.

Code, s. 286; 1887, c. 61; C. C. P., s. 420; 1868-9, c. 93, s. 3.

Note. For what judge to approve, see s. 531.

678. Ex parte proceedings validated. Any approval made prior to the tenth day of February, one thousand eight hundred and eighty-seven of any sale of the land of any infant in any ex parte proceeding, wherein such infant has appeared by his or her guardian, by a judge of the district or a judge holding court therein, is hereby confirmed, as far as regards the jurisdiction of the judge approving such proceedings.

1887, c. 61, s. 2.

679. Orders signed by judge. Every order or judgment in a special proceeding, which is required to be made by a judge of the

superior court, either in or out of term, shall be authenticated by his signature.

Code, s. 288; 1868-9, c. 93, s. 5; 1872-3, c. 100.

680. Reports of commissioners and jurors; confirmed, when.

Every order or judgment in a special proceeding imposing any duty on commissioners or jurors shall prescribe the time within which such duty shall be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of such duty file their report with the clerk of the superior court; and if no exception is filed to such report within twenty days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties.

1893, c. 209.

681. No report set aside for trivial defect. No report or return made by any commissioners shall be set aside and sent back to them, or others for a new report by reason of any defect or omission not affecting the substantial rights of the parties, but such defect or omission may be amended by the court, or by the commissioners, by permission of the court.

Code, s. 289; 1868-9, c. 93, s. 7.

682. Commissioners to sell to settle in sixty days. In all actions or special proceedings when any person shall be appointed commissioner to sell any real or personal property, he shall, within sixty days after the maturity of the note or bond for the balance of the purchase money of said real or personal property, or the payment of the amount of the bid, when the sale is for cash, file with the clerk of the superior court a final account of his receipts and disbursements on account of said sale; and the clerk shall audit said account and record it in the book in which the final settlements of executors and administrators are recorded.

1901, c. 614, ss. 1, 2.

XXXIII. ARREST AND BAIL.

683. Arrested only as herein prescribed. No person shall be arrested in a civil action, except as prescribed by this chapter; but this provision shall not apply to proceedings for contempt.

Code, s. 290; C. C. P., s. 148.

684. In what cases. The defendant may be arrested, as herein-after prescribed, in the following cases:

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident

of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining or converting property real or personal.

2. In an action for a fine or penalty, or for seduction, or for money received, or for property embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property, unjustly detained, where the property, or any part thereof, has been concealed, removed or disposed of, so that it can not be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

5. When the defendant has removed, or disposed of, his property, or is about to do so, with intent to defraud his creditors.

But no woman shall be arrested in any action, except for a wilful injury to person, character or property; and no person shall be arrested on Sunday.

Code, s. 291; C. C. P., s. 149; 1869-70, c. 79; R. C., c. 31, s. 54; 1777, c. 118, s. 6; 1891, c. 541.

Note. For arrest and bail in usurping an office, see s. 786.

685. Who issues order. An order for the arrest of the defendant must be obtained from the court in which the action is brought or from a judge thereof.

Code, s. 292; C. C. P., s. 150.

686. Order obtained on affidavit. The order may be made where it shall appear to the court or judge thereof, by the affidavit of the plaintiff or of any other person that a sufficient cause of action exists, and that the case is one of those provided for in this subchapter.

Code, s. 293; C. C. P., s. 151.

687. Undertaking before order. Before making the order the court or judge shall require a written undertaking on the part of the plaintiff, with sufficient surety payable to the defendant, to the effect that if the defendant recover judgment, the plaintiff will pay all damages which he may sustain by reason of the arrest, not

exceeding the sum specified in the undertaking, which shall be at least one hundred dollars.

Code, s. 294; C. C. P., s. 152; 1868-9, c. 277, s. 7.

Note. For surety companies as surcty, see chapter Official Bonds.

688. Time when order may issue; form. The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought, and notice of such return shall be served on the plaintiff or his attorney as prescribed by law for the service of other notices.

Code, s. 295; C. C. P., s. 153.

689. Copy of affidavit and order to defendant. The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof.

Code, s. 296; C. C. P., s. 154.

690. Order, how executed. The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law; and may call the power of the county to his aid in the execution of the arrest.

Code, s. 297; C. C. P., s. 155.

691. Vacated unless served before judgment; time to move to vacate. The order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action.

Code, s. 295; C. C. P., s. 153.

692. Motion by defendant to vacate order; jury trial, when. A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. And he may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues are tried by a jury; and if the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging the defendant from arrest and vacating the order of arrest, and the defendant shall recover of the plaintiff all costs of the proceeding in such arrest as he shall have incurred in defending the said action.

Code, s. 316; 1889, c. 497; C. C. P., s. 174.

693. Counter affidavits by plaintiff, when. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made.

Code, s. 317; C. C. P., s. 175.

694. How defendant discharged. The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

Code, s. 298; C. C. P., s. 156.

695. Defendant's undertaking. The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the third subdivision of section six hundred and eighty-four, an undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under subchapter entitled Claim and Delivery.

Code, s. 299; C. C. P., s. 157.

Note. See ss. 684, 752.

696. Defendant's undertaking delivered to clerk; plaintiff's exceptions. Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from the liability.

Code, s. 304; C. C. P., s. 162.

697. Qualification of bail. The qualifications of bail must be as follows:

1. Each of them must be a resident and freeholder within the state.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Code, s. 306; C. C. P., s. 164.

698. Notice of justification; new bail. On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff, or his attorney, notice of the justification of the same or other bail (specifying the places of residence and occupation of the latter) before the court, justice of the peace, or judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form hereinbefore prescribed.

Code, s. 305; C. C. P., s. 163.

Note. See s. 695.

699. Justification of bail. For the purpose of justification, each of the bail shall attend before the court or judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such a manner as the court, the justice of the peace, or the judge, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Code, s. 307; C. C. P., s. 165.

700. If bail sufficient, examination certified, sheriff exonerated. If the court, justice of the peace or judge find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

Code, s. 308; C. C. P., s. 166.

701. Deposit in lieu of bail. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged from custody.

Code, s. 309; C. C. P., s. 167.

702. Deposit paid into court; liability on sheriff's bond. The sheriff shall, within four days after the deposit, pay the same into court, and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquencies.

Code, s. 310; C. C. P., s. 168.

703. Bail substituted for deposit. If money be deposited, as provided in the two preceding sections, bail may be given and justified

upon notice according to law any time before judgment; and thereupon the judge, court or justice of the peace shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly.

Code, s. 311; C. C. P., s. 169.

704. Deposit applied to plaintiff's judgment. When money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied.

Code, s. 312; C. C. P., s. 170.

705. Defendant in jail, sheriff may take bail. If any person for want of bail shall be lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken.

Code, s. 318; R. C., c. 11, s. 8.

Note. For power of sheriff to administer oaths, see Oaths, s. 2373.

706. Sheriff liable as bail, when. If, after being arrested, the defendant escapes, or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant, to enforce an order or judgment in the action.

Code, s. 313; C. C. P., s. 171.

707. Action on sheriff's bond, when. If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

Code, s. 314; C. C. P., s. 172.

708. Bail exonerated. The bail may be exonerated, either by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county

where he was arrested, in execution thereof, at any time before final judgment against the bail.

Code, s. 303; C. C. P., s. 161.

709. Surrender of defendant. At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender.

2. Upon the production of a copy of the undertaking and sheriff's certificate, the court, or a judge thereof, may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in subdivision three of section six hundred and eighty-four, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under subchapter entitled Claim and Delivery.

Code, s. 300; C. C. P., s. 158.

Note. See ss. 684, 752.

710. Bail may arrest defendant. For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking, may empower any person over twenty-one years of age to do so.

Code, s. 301; C. C. P., s. 159.

711. Proceedings against bail by motion. In case of failure to comply with the undertaking, the bail may be proceeded against by motion in the cause on ten days' notice to such bail.

Code, s. 302; C. C. P., s. 160.

712. Bail liable to sheriff, when. The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action, for damages which he may sustain by reason of such omission.

Code, s. 315; C. C. P., s. 173.

713. Bail to pay costs, when. Whenever a notice shall issue against any person, as the bail of any other person, and the bail, at or before the term of the court at which such bail is bound to appear, or ought to plead, shall not be discharged from his liability

as bail by the death or surrender of his principal or otherwise; in that case the bail shall be liable for all costs which may accrue on said notice, notwithstanding the bail may be afterwards discharged, by the death or surrender of the principal, or otherwise.

Code, s. 319; R. C., c. 11, s. 10.

714. Bail not discharged by amendment. No amendment of process or pleading shall discharge the bail of the party arrested thereon, unless the amendment be to enlarge the sum demanded beyond the sum expressed in the bail bond.

Code, s. 320; R. C., c. 11, s. 11.

XXXIV. ATTACHMENT.

715. When issued. A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in this chapter, when the action is to recover a sum of money only, or damages for one or more of the following causes:

1. Breach of contract, express or implied.
2. Wrongful conversion of real or personal property.
3. Any other injury to personal property, in consequence of negligence, fraud, or other wrongful act.
4. Any injury to the person, caused by negligence or wrongful act.

Code, s. 347; 1893, c. 77; 1901, c. 740; C. C. P., s. 197.

716. Affidavit must show what. To entitle the plaintiff to such a warrant he must show by affidavit to the satisfaction of the court granting the same as follows:

1. That one of the causes of action specified in the preceding section exists against the defendant. If the action is to recover damages for breach of contract, the defendant must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the state, or a domestic corporation none of whose officers can be found in the state after due diligence; or, if he is a natural person and a resident of the state, that he has departed therefrom, with intent to defraud his creditors or to avoid service of summons, or keeps himself concealed therein with like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with the like intent.

Code, s. 349; 1897, c. 476; C. C. P., s. 201.

717. Affidavits for attachment filed. It shall be the duty of the plaintiff procuring a warrant of attachment, within ten days from the issuing thereof, to file the affidavits on which the same was granted in the office of the clerk of the superior court to which, or with the justice of the peace before whom the process is made returnable.

Code, s. 355; C. C. P., s. 201.

718. By whom granted. If the action be not founded on a contract, or if founded on a contract and the sum demanded exceeds two hundred dollars, a warrant of attachment may be obtained from the judge of the district embracing the county in which the action has been instituted, or from the clerk of the superior court from which the summons in the action issued; and it may be issued to any county in the state where the defendant has property, money, effects, choses in action or debts due him, and shall be made returnable in term time to the court from which the summons issued.

Code, s. 351; C. C. P., s. 199; 1869-70, c. 147; 1870-1, c. 166, ss. 1, 3; 1874-5, c. 111; 1876-7, c. 251.

719. Time of issuance; service of summons essential. The warrant of attachment may be granted to accompany the summons, or at any time after the commencement of the action. Personal service of the summons must be made upon the defendant against whose property the attachment is granted, within thirty days after the granting thereof, or else upon the expiration of the same time, service of summons by publication must be commenced pursuant to an order obtained therefor, and if publication has been, or is thereafter commenced, the service must be made complete, by the continuance thereof.

Code, s. 348; C. C. P., s. 197.

720. Undertaking. Before issuing the warrant, the officer issuing the same shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect, that if the defendant recover judgment, or the attachment be set aside by order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars.

Code, s. 356; C. C. P., s. 202.

721. Validity of undertaking. It shall not be a defense to an action upon an undertaking; given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause.

Code, s. 358.

722. To whom warrant directed; what required of officer.

The warrant shall be directed to the sheriff of any county in which the property of such defendant may be, or in case it be issued by a justice of the peace, to such sheriff, or to any constable of such county, and shall require such sheriff or constable to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, together with costs and expenses; it must also state when and where it shall be returned. Several warrants may be issued at the same time to the sheriffs of different counties: Provided, that where the warrant is issued by a justice of the peace to another county than his own, the clerk of the superior court of his county shall certify that he is a justice of the peace; that the signature to the warrant is in the handwriting of the said justice of the peace.

Code, s. 357; 1895, c. 435, s. 1; C. C. P., s. 203.

723. Notice, how served. When the warrant of attachment is taken out at the time of issuing the summons, and the summons is to be served by publication, the order shall direct that notice be given in said publication to the defendant of the issuing of the attachment, and when the warrant of attachment is obtained after the issuing of the summons, the defendant shall be notified by publication of the fact for four successive weeks in some newspaper published in the county to which it is returnable, or if there be none such, then in one published in the judicial district including said county, and if there be no newspaper published in the district, then in any newspaper published in the state. Said publication shall state the names of the parties, the amount of the claims, and in a brief way the nature of the demand and the time and place to which the warrant is returnable: Provided, that in proceedings by attachment begun and had before justices of the peace, advertisement in a newspaper shall not be necessary, but in all such cases, advertisement at the courthouse door and four other public places in the county for four successive weeks shall be sufficient publication, both as to the summons and warrant of attachment.

Code, s. 352; 1893, c. 363; 1870-1, c. 166, s. 3; 1874-5, c. 111, s. 2.

724. How executed; lien on land. The officer to whom such warrant of attachment is directed and delivered, shall seize and take into his possession the tangible personal property of the defendant, or so much thereof as may be necessary, and he shall be liable for the care and custody of such property, as if the same had been seized under execution; he shall levy on the real estate of the defendant as prescribed for executions; he shall make and return with the warrant

an inventory of the property seized or levied on; subject to the direction of the court, he shall collect and receive into his possession all debts owing to the defendant, and take such legal proceedings, either in his own name or in that of the defendant, as may be necessary for that purpose: Provided, that where the sheriff or other officer shall levy an attachment upon real estate, he shall certify said levy to the clerk of the superior court of the county where the land lies, with the names of the parties, and the clerk shall note the same on his judgment docket and index the same on the index to judgments, and that said levy shall be a lien only from the date of said entry by the said clerk: Provided, however, that if such levy is so docketed and indexed within five days after the making thereof it shall be a lien from the time it was made.

Code, s. 359; 1895, c. 435, s. 2; C. C. P., s. 204.

725. Return of warrant of, by sheriff. The sheriff shall return the warrant of attachment, and the undertakings provided for in this chapter, with a statement of his proceedings thereon, at the time and place at which it is on its face returnable, and upon, or at any time after, such return, he may obtain from the court to which the same was returnable, a certified copy thereof, which shall be held and deemed for the purpose of giving him authority, the same as the original, and when the warrant shall have been fully executed or discharged, the sheriff shall return the same, with his proceedings, to said court.

Code, s. 376; C. C. P., s. 214.

726. When granted by justice of peace. If the action be not founded on contract, and the value of the property in controversy does not exceed the sum of fifty dollars, the warrant of attachment may, or if the action be founded on contract, and the sum demanded does not exceed two hundred dollars, the warrant of attachment must be obtained from, and made returnable before some justice of the peace of a county, to the superior court of which it might have been returnable had the sum demanded exceeded two hundred dollars, or had the action not have been founded on contract.

Code, s. 353; C. C. P., s. 200; 1876-7, c. 251.

727. Issued by justice of peace, publication. The plaintiff, within thirty days after obtaining a warrant of attachment from a justice of the peace, shall cause publication thereof to be made for four successive weeks at the courthouse door and four other public places in the county where the warrant is returnable.

Code, s. 350; C. C. P., s. 198; 1868-9, c. 95, s. 3; 1870-1, c. 166, s. 4; 1874-5, c. 111.

Note. For computation of time, see s. 841.

For publication of summons, see ss. 403, 404, 405.

728. Justice's attachment against land. If the attachment be levied on real property, the justice shall proceed to try the action, but shall issue no execution to sell the real property, and shall return the papers in the case to the office of the clerk of the superior court of his county, where the judgment shall be docketed. The levy of the attachment, however, shall be a lien on the real estate, when the provisions of section seven hundred and twenty-four are complied with.

Code, s. 354; 1868-9, c. 95, s. 4.

729. Sale of attached property pendente lite. If any property, so seized, shall be perishable, or is of such a character as to materially deteriorate in value pending litigation, or of such character that the expense of keeping it until the determination of the suit would be likely to exceed one-fifth of its value, or if any part of it consists of a vessel, or of any share or interest therein, and the person to whom it belongs, or his agent, shall not within ten days after the serving of such attachment, reclaim the same, the sheriff or other officer having possession thereof, shall apply to the court for authority to sell the same, stating the circumstances, and the same shall be sold, under the order and direction of the court, and the proceeds of such sale shall be liable to the judgment obtained upon such attachment, and shall be retained by the sheriff or other officer to await such judgment.

Code, s. 360; R. C., c. 7, s. 6; 1777, c. 115, s. 28; C. C. P., s. 205.

Note. For sale of corporate property by receiver during litigation, see s. 1105.

730. Replevy by defendant; undertaking. The person owning the property advertised to be sold according to the provisions of this subchapter, his agent or attorney may, at any time before sale, replevy the same, by giving an undertaking, in double the amount of the value of the property, with sufficient surety, to the effect that he will return the property to the sheriff, or other officer, if return thereof be adjudged by the court, and pay all costs that may be awarded against him; and if return of said property can not be had, then that he will pay plaintiff the value of said property, and all costs and damages that may be awarded against him. And upon the execution of this undertaking, the sheriff, or other officer, shall deliver said property to the person owning the same.

Code, s. 361; R. C., c. 7, s. 5; 1777, c. 115, s. 28.

731. Defendant may apply for discharge and delivery of property. Whenever the defendant shall have appeared in such action, he may apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the same; and if the same be granted, all the proceeds of sale, and moneys collected in

such action, and all the property attached remaining in the hands of any officer of the court, under any process or order in such action, shall be delivered or paid to the defendant or to his agent, and released from the attachment. And where there is more than one defendant, and the several property of either of the defendants has been seized by virtue of the order of attachment, the defendant, whose several property has been seized, may apply in like manner for relief.

Code, s. 373; C. C. P., s. 212.

732. Defendant's undertaking. Upon such application the defendant shall deliver to the court an undertaking, executed by two sureties residing in this state, approved by such court, to the effect that such surety will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit that the property attached be of less value than the amount claimed by the plaintiff, the court or judge may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And where there is more than one defendant, and the several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the court an undertaking, in accordance with this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant. And all of this section, applicable to such an undertaking, shall be applied thereto.

Code, s. 374; C. C. P., s. 213.

733. Corporate stock, etc., liable to attachment. The rights or shares which the defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this state of such defendant, shall be liable to be attached and levied on, and sold to satisfy the judgment and execution.

Code, s. 362; C. C. P., s. 206.

Note. For execution against, see Corporations, subchapter Execution.

734. Levied on incorporeal property. The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or with the secretary, cashier or managing agent thereof, or with the debtor

or individual holding such property, with a notice showing the property levied on. Such certified copy must be furnished to the sheriff by the plaintiff, and the certification must be by the clerk of the court from which the warrant was issued, or by the justice of the peace who issued the same.

Code, s. 363; C. C. P., s. 207.

Note. See Corporations, subchapter Execution.

735. Certificate of defendant's interest to be furnished to sheriff. Whenever the sheriff or other lawful officer, with a warrant of attachment or execution, shall apply to any president, or other head of any association or corporation or director, secretary, cashier or managing agent thereof, or to any debtor or individual, for the purpose of attaching or levying on the property of the defendant in such warrant, such officer, debtor or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to the defendant. If such officer, debtor or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such order may be enforced by attachment.

Code, s. 369; C. C. P., s. 208.

Note. See Corporations, subchapter Execution.

736. Garnishee summoned; answer of; judgment against. When the sheriff or other officers shall serve an attachment on any person supposed to be indebted to, or to have any effects of the defendant in the attachment, he shall at the same time summon such person as a garnishee in writing, which summons and notice shall be issued by the clerk of the superior court, or justice of the peace, at the request of the plaintiff, to appear at the court to which the attachment shall be returnable, or if issued by a justice of the peace, at a place and time named in the notice, not exceeding twenty days from date of notice, to answer upon oath what he owes to the defendant and what effects of the defendant he hath in his hands, and had at the time of serving such attachment, and what effects or debts of the defendant there are in the hands of any other, and what person, to his knowledge and belief; and when an attachment shall be served on any garnishee in manner aforesaid, it shall be lawful upon his appearance and examination to enter up judgment and award execution for the plaintiff against such garnishee, for all sums of money due to the defendant from him, and for all effects and estates of any kind belonging to the defendant, in his posses-

sion or custody, for the use of the plaintiff, or so much thereof as shall be sufficient to satisfy the debt and costs and all charges incident to levying the same; and all goods and effects whatsoever in the hands of any garnishee belonging to the defendant, shall be liable to satisfy the plaintiff's judgment, and shall be delivered to the sheriff or other officer serving the attachment.

Code, s. 364; R. C., c. 7, s. 7; 1777, c. 115, s. 28.

737. When garnishee fails to appear. When any garnishee shall be summoned as aforesaid, and shall fail to appear and discover on oath as directed, the court, after solemnly calling the garnishee, shall enter a conditional judgment against him, and thereupon a notice shall issue against him returnable to the court having jurisdiction, to show cause why final judgment shall not be entered against him; and if, upon due execution thereof, such garnishee shall fail to appear at the time and place named in the notice, and discover on oath in manner aforesaid, the court shall confirm said judgment and award execution for the plaintiff's whole judgment and costs; and if, upon examination of the garnishee, it shall appear to the court that there is any of the defendant's estate in the hands of any person who has not been summoned, the court shall, upon motion of the plaintiff, grant a judicial attachment, to be levied in the hands of every other person having any of the estate of the defendant in his custody or possession, who shall appear and answer, and shall be liable as other garnishees.

Code, s. 365; R. C., c. 7, s. 8; 1777, c. 115, s. 28; 1838, c. 2.

738. Garnishee denying property; issue tried. When any garnishee shall deny that he owes to, or has in his possession any property of, the defendant, and the plaintiff shall on oath suggest to the court the contrary; or when any garnishee shall make such a statement of facts that the court can not proceed to give judgment thereon, then the court shall order an issue to be made up, which shall be tried by a jury, and on their verdict judgment shall be rendered: Provided, that in a court of a justice of the peace, he may try such issue, unless a jury be demanded, and then proceedings are to be conducted, in all respects, as in jury trials before courts of justices of the peace.

Code, s. 366; R. C., c. 7, s. 9; 1793, c. 389, s. 2.

739. Property with garnishee valued; when excused. When a garnishee shall on oath confess that he has in his hands any property of the defendant of a specific nature, or is indebted to such defendant by any security or assumption for the delivery of any specific article, except as hereinafter excepted, then the court shall immediately order a jury to be impaneled and sworn to inquire of

the value of such specific property, and the verdict of the jury shall subject such garnishee to the payment of the valuation, or so much thereof as shall be sufficient to satisfy the debt or damages, and costs to the plaintiff: Provided, that in a court of a justice of the peace, he may try such issue, unless a jury be demanded, and then proceedings are to be conducted in all respects as in jury trials before courts of justices of the peace. Provided further, that if such garnishee shall also state in his answer that said specific property was left, or deposited, in his possession by the defendant as a bailment, or that he hath tendered said specific articles agreeable to contract, and that they were refused by the defendant, and that he then was, and always had been, ready to deliver the same; or that he had such specific articles at the time and place specified in such covenant or agreement ready to be delivered, and is still ready to deliver the same; and such statement shall be admitted by the plaintiff or found by a jury or the court, then in any such case, the garnishee shall be exonerated by the delivery of such specific articles to the sheriff, who shall proceed as if the attachment had been originally levied on the property.

Code, s. 367; R. C., c. 7, s. 11; 1793, c. 389; 1794, c. 424.

740. Conditional judgment against garnishee, when. When any garnishee shall declare in his answer that the money or specific article due by him will become payable or deliverable at a future day, and the same shall be admitted by the plaintiff or found by a jury or the court, in such case conditional judgment shall be entered against the garnishee, and the plaintiff may obtain judgment against the defendant for his demand, but shall not take final judgment against the garnishee without notice to show cause.

Code, s. 368; R. C., c. 7, s. 12; 1794, c. 424, s. 2.

741. Judgment, how satisfied. In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose—

1. By paying over to such plaintiff the proceeds of all property sold by him, and of all debts or credits collected by him, or so much as shall be necessary to satisfy such judgment.

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell under such execution so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall there-

upon have all the rights and privileges in respect thereto which were had by such defendant.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose, shall have all the authority which he had to seize the same under the attachment; and any person who shall wilfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached, under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

At the expiration of six months from the docketing of the judgment the court shall have power, upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff, since the service of the attachment, the property attached, and the disposition thereof, also the affidavit of the sheriff that he has used due diligence, and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same, any part or portion thereof, to order the sheriff to sell the same upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or to his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order, as to service of notice, and time of service, as shall be deemed just. When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

Code, s. 370; C. C. P., s. 209.

742. Plaintiff may sue on defendant's notes, when. The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff, of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall in all cases, when required by the sheriff, justify by making an affidavit that each is a freeholder, and worth double the amount

of the penalty of the bond, over and above all demands, liabilities and exemptions.

Code, s. 371; C. C. P., s. 210.

743. On defendant's recovery, bonds and property delivered to him. If the foreign corporation, or the absent, absconding, or concealed defendant, recover judgment against the plaintiff in such action, any bond taken upon the issuing of the warrant of attachment, and any bond taken by the sheriff, except such as are mentioned in the preceding section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or to his agent, on request, and the warrant shall be discharged and the property released.

Code, s. 372; C. C. P., s. 211.

744. Motion to vacate, or increase security. The defendant, or a person who has acquired a lien upon, or interest in, his property before or after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to the court having jurisdiction to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies.

Code, s. 377.

745. Exceptions to and justification of sureties. The sureties to all undertakings in all proceedings for attachment may be excepted to, and justified as prescribed in respect to bail upon an order of arrest.

Code, s. 378.

746. Interpleader. When the property attached shall be claimed by any other person, the claimant may interplead, as provided for interpleader in claim and delivery.

Code, s. 375; R. C., c. 7, s. 10; 1793, c. 389, s. 3.

XXXV. CLAIM AND DELIVERY.

747. Claim for delivery of personal property, when. The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this subchapter.

Code, s. 321; C. C. P., s. 176.

748. Affidavit and requisites. Where a delivery is claimed, an affidavit must be made, before the clerk of the court in which the action is required to be tried, or before some person competent to administer oaths, by the plaintiff, or some one in his behalf, showing—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.

4. That the same has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property.

Code, s. 322; C. C. P., s. 177; 1881, c. 134.

Note. For statute forbidding seizure of property taken for a tax, see s. 776.

749. Order for sheriff to seize property and deliver to plaintiff.

The clerk of the court shall, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff: Provided, the plaintiff shall give the undertaking prescribed in the succeeding section.

Code, s. 323; C. C. P., s. 178.

750. Plaintiff's undertaking; copies furnished defendant. Upon the receipt of the order from the clerk with a written undertaking payable to the defendant executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant with damages for its deterioration and detention if return can be had, and if for any cause return can not be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the

usual place of abode of either, with some person of suitable age and discretion.

Code, s. 324; 1885, c. 50; C. C. P., s. 179.

751. Exceptions to undertaking; liability of sheriff. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff personally, or by leaving a copy at his office in the county town of the county, or, if he have no such office, at the office of the clerk of the court, that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or until new sureties shall be substituted and justify. If the defendant except to the sureties, he can not reclaim the property as provided in the succeeding section.

Code, s. 325; C. C. P., s. 180.

752. Defendant's undertaking for replevy. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages for its deterioration and its detention, if delivery can be had, and if such delivery can not for any cause be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention. If a return of the property be not so required, within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, unless it shall be claimed by an interpleader.

Code, s. 326; 1885, c. 50, s. 2; C. C. P., s. 181.

753. Justification of defendant's sureties. The defendant's sureties, upon a notice to the plaintiff of not less than two or more than six days, shall justify before the court, a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their

place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

Code, s. 327; C. C. P., s. 182.

754. Qualification and justification of defendant's sureties, how. The qualification of the defendant's sureties, and their justification, shall be as prescribed in respect to bail upon an order of arrest.

Code, s. 328; C. C. P., s. 183.

755. Property concealed in buildings. If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it be not delivered he shall cause the building or enclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county, and if the property be upon the person the sheriff or other officer may seize the person, and search for and take the same.

Code, s. 329; C. C. P., s. 184.

756. How property seized shall be kept. When the sheriff shall have taken property, as in this subchapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

Code, s. 330; C. C. P., s. 185.

757. Property taken claimed by third person. When the property taken by the sheriff shall be claimed by any person other than the plaintiff or the defendant the claimant may interplead upon his filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title; and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in plaintiff's affidavit, for the delivery of the property to the person entitled to the same, and for the payment of all such costs and damages as may be awarded against him; this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavits shall be served by the sheriff on the plaintiff and defendant at least ten days before the return day of the summons in said action, when the court trying the same shall order a jury to be impaneled to enquire in whom is the right to the property specified in plaintiff's complaint; and the finding of the jury shall be conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. Provided, that in a court of a justice

of the peace he may try such issue unless a jury be demanded, and then proceedings are to be conducted in all respects as in jury trials before courts of justices of the peace.

Code, s. 331; C. C. P., s. 186; 1793, c. 389, s. 3; R. C., c. 7, s. 10.

758. When sheriff may deliver property to intervenor. Upon the filing by the claimant of the undertaking set forth in the preceding section, the sheriff shall not be bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff shall execute and deliver to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity.

Code, s. 332; R. C., c. 7, s. 10; 1793, c. 389, s. 3.

759. Sheriff to return undertaking, etc., in ten days. The sheriff shall return the undertaking, notice and affidavit with his proceedings thereon to the court in which the action is pending within ten days after taking the property mentioned therein.

Code, s. 133; C. C. P., s. 187.

XXXVI. CONTROVERSY WITHOUT ACTION.

760. How submitted; affidavit; judgment. Parties to a question in difference which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall thereupon hear and determine the case, and render judgment thereon as if an action were pending.

Code, s. 567; C. C. P., s. 315.

761. Judgment roll. Judgment shall be entered on the judgment docket, as in other cases, but without costs for any proceeding prior to trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll.

Code, s. 568; C. C. P., s. 316.

762. Judgment enforced; appealed from. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

Code, s. 569; C. C. P., s. 317.

764a. Timber lands, trial of title to. In all actions to try title to timber lands and in all actions for trespass thereon for cutting timber trees, whenever the court shall find as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees shall be finally determined in such action: Provided, that in all cases where the title to any timber or tree, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the fee of the soil or other estate in the land by another or others, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term shall be suspended during the pendency of such action.

1901, c. 666, s. 1; 1903, c. 642.

764b. When timber may be cut. Whenever in any such action, the judge shall find as a fact that the contention of either party thereto is not in good faith and is not based upon evidence constituting a prima facie title, then upon motion of the other party thereto, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the said timber trees by giving bond as now required by law. Nothing in this section shall affect the right of appeal as now allowed by law, and whenever any party to such action may be enjoined, a sufficient bond shall be required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law.

1901, c. 666, ss. 2, 3.

XXXVII. INJUNCTION.

763. Temporary, issued, when. The writ of injunction as a provisional remedy is abolished, and a temporary injunction by order is substituted therefor. The order may be made by any judge of a superior court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission, or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

2. When, during the litigation, it shall appear by affidavit that a party thereto is doing, or threatens, or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

3. When, during the pendency of an action, it shall appear by affidavit of any person, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud the plaintiff.

Code, ss. 334, 338; C. C. P., ss. 188, 189.

764. Solvent defendant restrained from cutting trees. In an application for an injunction to enjoin a trespass on land it shall not be necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees.

1885, c. 401.

765. Time of issuing; copy of affidavit served. The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

Code, s. 339; C. C. P., s. 190.

766. Not issued for more than twenty days without notice; continues until dissolved. No restraining order, or order to stay proceedings for a longer time than twenty days, shall be granted by a judge out of court, except upon due notice to the adverse party; but the said order shall continue and remain in force until vacated upon notice.

Code, s. 346; C. C. P., s. 345.

767. Issued after answer, only on notice. An injunction shall not be allowed after the defendant shall have answered, unless upon

notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the judge granting or refusing the injunction.

Code, s. 340; C. C. P., s. 191.

Note. For statute regulating notice, see ss. 831, 832.

768. Order to show cause; restraint in meantime. If the judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

Code, s. 342; C. C. P., s. 193.

769. What judges have jurisdiction. The judges of the superior court of this state shall have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings, which are authorized by law: Provided, that a judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he may have jurisdiction to hear, and determine under the commission issued to him, and the same shall be returnable as directed by the judge in the order.

Code, s. 335; 1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3.

770. Before what judge returnable. All restraining orders and injunctions granted by any of the judges of the superior court, except a judge holding a special term in any county, shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district where the civil action or special proceeding is depending, within twenty days from date of order. And if the judge before whom the same is returned shall, from sickness, inability, or from any cause, fail to hear said motion and application, or to continue the same to some other time and place, then it shall be competent for any judge resident in some adjoining district, or a judge assigned to hold the court of some adjoining district, or the judge holding by exchange the court of some adjoining district, to hear and determine the said motion and application, after giving ten days' notice to the parties interested in the application or motion, upon its being satisfactorily shown to him by affidavit or otherwise, that the judge before whom the same was returnable failed to act upon the same, or to continue the same to some other time and place. The effect of such removal shall be to continue in force the motion and application theretofore granted, till the same can be heard and determined by the judge having jurisdiction of the same.

Code, s. 336; 1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51.

771. Stipulation as to judge to hear. By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorney, to the effect that the matter may be heard before any judge, to be designated in such stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon receipt of such stipulations, forward the same and all the papers to the judge designated in the stipulation, whose duty it shall thereupon be to hear and decide the matter, and return all the papers to the court out of which they issued, the necessary postage or expressage money to be furnished to the judge.

Code, s. 337; 1883, c. 33.

772. Undertaking. Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof, that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before and approved by, the said clerk, or by the judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto.

Code, s. 341; C. C. P., s. 192.

773. Damages. A judgment dissolving an injunction shall carry with it judgment for damages against the party procuring the injunction and the sureties on his undertaking without the requirement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge shall direct, and the decision of the court thereupon shall be conclusive as to the amount of damages upon all the persons who have an interest in the undertaking.

Code, s. 341; 1893, c. 251.

774. Issued without notice, vacated when; verified answer an affidavit. If the injunction be granted without notice, the defendant, at any time before the trial, may apply, upon ten days' notice to the judge having jurisdiction thereof, to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer; but if no such application be made, the injunction shall continue, and be in force until such application shall be made and determined by the judge, and a verified answer has the effect only of an affidavit.

Code, s. 344; C. C. P., s. 195.

775. Opposing affidavits. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proof, in addition to those on which the injunction was granted.

Code, s. 345; C. C. P., s. 196.

776. When granted to restrain collection of taxes. No injunction shall be granted by any court or judge to restrain the collection of any tax or any part thereof, nor to restrain the sale of any property for the nonpayment of any such tax, except such tax or the part thereof enjoined be levied or assessed for an illegal or unauthorized purpose or be illegal or invalid, or the assessment be illegal or invalid.

1901, c. 558, s. 30; 1899, c. 15, s. 78; 1887, c. 137, s. 84.

NOTE. For action to recover illegal taxes paid, see s. 2862.

For injunction pending appeal from Corporation Commission, see s. 1148.

XXXVIII. MANDAMUS.

777. Begun by summons and verified complaint. All applications for writs of mandamus shall be made by summons and complaint, and the complaint shall be duly verified.

Code, s. 622; 1871-2, c. 75.

778. Money demand enforced at term. In all such applications, when the plaintiff seeks to enforce a money demand, the summons, pleadings and practice shall be the same as is prescribed for civil actions.

Code, s. 623; 1871-2, c. 75, s. 2.

779. Other actions returnable in vacation; issues of fact. When the plaintiff seeks relief other than the enforcement of a money demand, the summons shall be made returnable before a judge of the superior court at chambers, or in term at a day specified in the summons, not less than ten days after the service of the summons and complaint upon the defendant; at which time the court, except for good cause shown, shall proceed to hear and determine the action, both as to law and fact: Provided, that when an issue of fact is raised by the pleading, it shall be the duty of the court, upon the motion of either party, to continue the action until said issue of fact can be decided by a jury at the next regular term of the court.

Code, s. 623; 1871-2, c. 75, s. 3.

XXXIX. NUISANCE.

780. How remediable. Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or for both.

Code, s. 630; C. C. P., s. 387.

XL. QUO WARRANTO.

781. Writs of *sci. fa.* and quo warranto abolished. The writ of *scire facias*, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this subchapter.

Code, s. 603; C. C. P., s. 362; R. C., c. 26, ss. 5, 25.

782. Action by attorney general upon usurpation or forfeiture of office. An action may be brought by the attorney general in the name of the state, upon his own information, or upon the complaint of any private party, against the parties offending, in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or,

2. When any public officer, civil or military, shall have done or suffered an act which, by law, shall make a forfeiture of his office.

Code, s. 607; C. C. P., s. 366.

Note. For right of attorney general to institute actions for the forfeiture of corporate charters and the like, see s. 1071.

783. Leave granted by attorney general to private person, when. When application shall be made to the attorney general by a private relator to bring such an action, he shall grant the leave that the same may be brought in the name of the state, upon the relation of such applicant, upon such applicant tendering to the attorney general satisfactory security to indemnify the state against all costs and expenses which may accrue in consequence of the bringing of such action.

Code, s. 608; 1874-5, c. 76; 1881, c. 330.

Note. For costs in such action, see s. 1210.

For leave in actions relating to corporations, see s. 1069.

784. Solvent sureties required. The attorney general, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law

to be filed to indemnify the state against costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of said sureties as may be satisfactory to him.

1901, c. 595, s. 2.

785. Leave withdrawn, action dismissed, bond insufficient.

When the attorney general shall have granted leave to a private relator to bring an action in the name of the state to try the title to an office, and it shall afterwards be shown to the satisfaction of the attorney general that the bond filed by such private relator is insufficient, or that the securities thereto are insolvent, the attorney general may recall and revoke such leave theretofore granted, and upon a certificate of the withdrawal and revocation by the attorney general to the clerk of the court of the county where any such action is pending, it shall be the duty of the judge presiding, upon motion of the defendant, to dismiss the action.

786. Arrest and bail of defendant usurping office. Whenever such action shall be brought against a person for usurping an office, the attorney general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order shall be granted by a judge of the superior court for the arrest of such defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

Code, s. 609; C. C. P., s. 369; 1883, c. 102.

787. Claim of several persons to office tried in one action.

Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Code, s. 614; C. C. P., s. 374.

788. Trials expedited. All actions to try the title or right to any office, state, county or municipal, shall stand for trial at the return term of the summons, if a copy of the complaint shall have been served with the summons, at least thirty days before the return day thereof; and it shall be the duty of the judges to expedite the trial of such actions, and to give them precedence over all other actions, civil or criminal. But it shall be unlawful to appropriate any public funds to the payment of counsel fees in any such action.

Code, s. 616; 1901, c. 42; 1874-5, c. 173.

789. Action brought within ninety days after induction into office. All actions brought by a private relator, upon the leave of the attorney general, to try the title to an office shall be brought, and a copy of the complaint served on the defendant, within ninety days after the induction of the defendant into the office to which the title is sought to be tried; and when it shall appear from the papers in the cause, or otherwise be shown to the satisfaction of the court that the summons and complaint have not been served within ninety days, it shall be the duty of the judge upon motion of defendant to dismiss the action at any time before the trial at the cost of the plaintiff.

1901, c. 519; 1903, c. 556.

790. Defendant's undertaking before answer. Before the defendant is permitted to answer or demur to the complaint he shall execute and file in the superior court clerk's office of the county wherein the suit is pending, an undertaking, with good and sufficient surety, in the sum of two hundred dollars, which may be increased from time to time, in the discretion of the judge, to be void upon condition that the defendant shall pay to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover.

1895, c. 105.

791. Possession of office not disturbed pending hearing. In any civil action pending in any of the courts of this state wherein the title to any office is involved, the defendant being in the possession of said office and discharging the duties thereof, shall continue therein pending such action, and no judge shall make any restraining order interfering with or enjoining such officer in the premises; and such officer shall, notwithstanding any such order, continue to exercise the duties of such office pending such litigation, and receive the emoluments thereof.

1899, c. 33.

792. Judgment by default and inquiry for failure of defendant to give bond. At any time after a duly verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether such complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days' notice to the defendant or his attorney of record, move before the resident judge or the judge riding the district at chambers, to require the defendant to give said undertaking; and it shall be the duty of the judge to require the defendant to give such undertaking within ten days, and if the undertaking shall not be so given, the judge shall render judgment in favor of plaintiff and

802. In what cases appointed. A receiver may be appointed—

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In cases provided in chapter entitled Corporations and subchapter thereof entitled Receivers; and in like cases, of the property within this state of foreign corporations.

The subchapter entitled Receivers, in the chapter entitled Corporations, shall be applicable, as near as may be, to receivers appointed hereunder.

Code, s. 379; C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.

Note. For appointment of receivers in proceedings supplemental to execution, see subchapter *infra* Supplemental Proceedings, s. 637.

803. Appointment refused, bond being given, when. In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom such application is made or pending shall have the discretionary power to refuse the appointment of a receiver, if the party against whom such relief is asked, whether a person, partnership or corporation, shall tender to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient sureties and duly justified according to law, conditioned for the payment of such amount as may be recovered in such action, and summary judgment may be taken upon said undertaking. In the progress of the action the court shall have power in its discretion to require additional sureties on such undertaking.

1885, c. 94.

804. Receiver's bond. A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court wherein the action is pending, an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And

the judge having jurisdiction thereof, may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, with the like condition. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver, nor for increasing the same, nor for removing a receiver.

Code, s. 383.

NOTE. For giving bond in surety companies, see ss. 238, 239.

XLII. TRUST FUNDS SUMMARILY PROTECTED.

805. Trust funds ordered paid into court. When it is admitted, by the pleading or examination of a party that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the judge.

Code, s. 380; C. C. P., s. 215.

806. Trust funds, etc., ordered seized by sheriff, when. Whenever, in the exercise of his authority, a judge shall have ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge.

Code, s. 381; C. C. P., s. 215.

807. Defendant ordered to satisfy sum admitted to be due. When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.

Code, s. 382; C. C. P., s. 215.

XLIII. WASTE.

808. How remediable. Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises.

Code, s. 624; C. C. P., s. 383.

809. For and against whom lies. In all cases of waste, an action shall lie in the superior court at the instance of him in whom the right is, against all persons committing the same, as well tenant for term of life as tenant for term of years and guardians.

Code, s. 625; R. C., c. 116, s. 1; 52 Hen. III., c. 23; 6 Edw. I., c. 5; 20 Edw. I., st. 2; 11 Hen. VI., c. 5.

810. Tenant in possession of particular estate liable. Where tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action shall lie against the said tenant for life or years.

Code, s. 626; R. C., c. 116, s. 2; 11 Hen. VI., c. 5.

811. Action by tenant against cotenant. Where a joint tenant or a tenant in common commits waste, an action shall lie against him at the instance of his cotenant or joint tenant.

Code, s. 627; R. C., c. 116, s. 4; 13 Edw. I., c. 22.

812. Heirs may sue, when. Every heir shall have his action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestor as in his own.

Code, s. 628; R. C., c. 116, s. 5; 6 Edw. I., c. 5; 11 Hen. VI., c. 5; 20 Edw. I., st. 2.

813. Judgment for treble damages and possession. In all cases of waste, when judgment shall be against the defendant, the court may give judgment for thrice the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the said damages shall not be paid on or before a day to be named in the judgment.

Code, s. 629; R. C., c. 116, s. 3; 6 Edw. I., c. 5; 20 Edw. I., st. 2.

XLIV. COMPROMISE.

814. Effect of compromise. In all claims, or money demands, of whatever kind, and howsoever due, where an agreement shall have been or shall be made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of such less amount according to any such agreement in compromise of the whole, shall be a full and complete discharge of the same.

Code, s. 574; 1874-5, c. 178.

815. Tender judgment; effect of refusal to accept. The defendant, at any time before the trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within

ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and can not be given in evidence; and if the plaintiff fail to obtain a more favorable judgment he can not recover costs, but must pay the defendant's costs from the time of the offer. In case the defendant shall set up a counterclaim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing, to allow judgment to be taken against him for the amount specified, or to allow said counterclaim to the amount specified with costs. If the defendant accept the offer, and give notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitle him to judgment, or if the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and can not be given in evidence; and if the defendant fail to recover a more favorable judgment, or to establish his counterclaim for a greater amount than is specified in said offer, he can not recover costs, but must pay the plaintiff's costs from the time of the offer.

Code, s. 573; C. C. P., s. 328.

816. Conditional tender of judgment for damages. In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fails in his defense, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, ten days before the trial, and on the trial have a verdict, the damages shall be assessed accordingly.

Code, s. 575; C. C. P., s. 329.

817. Effect of refusal. If the plaintiff does not accept the offer, he shall prove his damages, as if it had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defense in respect to the question of damages. Such expense shall be ascertained at the trial.

Code, s. 576; C. C. P., s. 330.

818. Disclaimer of title to trespass; tender of judgment. In actions of trespass upon real estate, wherein the defendant in his answer shall disclaim to make any title or claim to the lands on which the trespass is by the complaint supposed to be done, and the trespass be by negligence or involuntary, the defendant shall be per-

mitted to make a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass; whereupon, or upon some of them, the plaintiff shall join issue, and if the issue be found for the defendant, or if the plaintiff shall be nonsuited, he shall be barred from the said action and all other suits concerning the same.

Code, s. 577; R. C., c. 31, s. 79; 1715, c. 2, s. 7.

XLV. EXAMINATION OF PARTIES.

819. Action for discovery abolished. No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this subchapter.

Code, s. 579; C. C. P., s. 332.

820. Adverse party examined. A party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness to testify, either at the trial or conditionally or upon commission.

Code, s. 580; C. C. P., s. 333.

821. Before trial in his own county. The examination instead of being had at the trial, as provided in the preceding section, may be had at any time before the trial, at the option of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown, the judge or court shall order otherwise. But the party to be examined shall not be compelled to attend in any county other than that of his residence, or where he may be served with a summons for his attendance.

Code, s. 581; 1893, c. 114; 1899, c. 65; C. C. P., s. 334.

822. Party compelled to attend. The party to be examined, as in the preceding section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge, clerk or commissioner in like manner, and may be read by either party on the trial.

Code, s. 582; 1899, c. 65, s. 2; C. C. P., s. 335.

823. Testimony may be rebutted. The examination of the party thus taken may be rebutted by adverse testimony.

Code, s. 583; C. C. P., s. 336.

824. Refusal to testify; penalty. If a party refuses to attend and testify, as in the four preceding sections provided, he may be punished as for a contempt, and his pleadings may be stricken out.

Code, s. 584; C. C. P., s. 337.

825. Testimony of party may be rebutted. A party examined by an adverse party, as in this subchapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But if he testify to any new matter, not responsive to the enquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received.

Code, s. 585; C. C. P., s. 338.

826. Real party in interest examined. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

Code, s. 586; C. C. P., s. 339.

827. Examination of co-plaintiff or co-defendant. A party may be examined on behalf of his co-plaintiff or of a co-defendant as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in behalf of the party examined. And whenever one of several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defense, and shall be so received.

Code, s. 587; C. C. P., s. 340.

NOTE. For production of writings, see Evidence, s. 1640 et seq.

XLVI. MOTIONS AND ORDERS.

828. What is an order. Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

Code, s. 594; C. C. P., ss. 344, 345.

829. Motions; where and when made. An application for an order is a motion. Motions may be made to a clerk of a superior court, or to a judge out of court, except for a new trial on the merits. Motions must be made within the district in which the action is triable. A motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, shall have preference over all other motions.

Code, s. 594; C. C. P., ss. 344, 345.

830. Affidavit for or against, compelled. When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpoenaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue.

Code, s. 594; C. C. P., ss. 344, 345.

831. Motions determined in ten days. Whenever a motion shall be made in any cause or proceeding in any of the courts, to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, or a motion to vacate or modify the same is made, it shall be the duty of the judge before whom such motion is made, to render and make known his decision on such motion within ten days after the day upon which such motion shall or may be submitted to him for decision.

Code, s. 594; C. C. P., ss. 344, 345.

832. Notice of motion. When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

Code, s. 595; C. C. P., s. 346.

XLVII. NOTICES.

833. In writing. All notices shall be in writing.

Code, s. 597; C. C. P., s. 349.

834. On whom served. Notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter.

Code, s. 597; C. C. P., ss. 349, 353.

Note. For statute against service on Sunday see s. 684, subsec. 5.

835. Service upon attorney. If served upon an attorney, service may be made during his absence from his office, by leaving the paper

with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or, if it be not open so as to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion.

Code, s. 597; C. C. P., ss. 349, 353.

836. Served on a party. If upon a party, it may be made by leaving the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

Code, s. 597; C. C. P., ss. 349, 353.

837. Served by publication. If upon a person who can not be found after due diligence, or who is not a resident of this state, the service thereof may be made by the publication of the notice once a week for four successive weeks in some newspaper published in the county from which the notice is issued; and if no newspaper be published therein, then in some newspaper published within the judicial district; and the proof of service shall be as is required by law in the case of a service of a summons by publication.

Code, s. 597; C. C. P., ss. 349, 353.

838. Subpœna, issuance and service. Service of a subpœna for witnesses may be made by a sheriff, coroner or constable, and proved by the return of such officer, or the service may be made by any person not a party to the action, and proved by his oath. A subpœna for witnesses need not be signed by the clerk of the court; it shall be sufficient if subscribed by the party or by his attorney.

Code, s. 597; C. C. P., ss. 349, 353.

839. To what this subchapter applies. This subchapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

Code, s. 597; C. C. P., ss. 349, 353.

840. Officers return evidence of service. When a notice shall issue to the sheriff, his return thereon that the same has been executed shall be deemed sufficient evidence of the service thereof.

Code, s. 940; R. C., c. 31, s. 123; 1799, c. 537.

XLVIII. TIME.

841. How computed. The time within which an act is to be done, as provided by law, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Code, s. 596; C. C. P., s. 348.

842. Computation of, in publications. The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication.

Code, s. 602; C. C. P., s. 359.

NOTE. See ss. 404, 727, 723, 834.

CHAPTER 12.

CLERK OF SUPERIOR COURT.

| | Sections. |
|------------------------|-----------|
| I. Office of, | 843—851 |
| II. Deputies, | 852—854 |
| III. Powers, | 855—859 |
| IV. Duties, | 860—868 |
| V. Reports, | 869—873 |
| VI. Money in hands of, | 874—877 |

I. OFFICE OF.

843. Includes judge of probate, which is abolished. The office or place of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior court as judges of probate shall be performed by the clerks of the superior court as clerks of said court, and all matters pending before said judges of probate shall be deemed transferred to the clerks of the superior court.

Code, s. 102.

844. How elected; term of office. A clerk of the superior court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the general assembly. Clerks of the superior court shall hold office for four years.

Const., Art. IV, ss. 16, 17.

845. How inducted into. The clerks of the superior court, before entering on the duties of their office, shall take and subscribe before some officer authorized by law to administer an oath, the oaths prescribed by law, and file such oaths with the register of deeds for the county.

Code, s. 74; C. C. P., s. 139.

Note. Acting before qualifying a misdemeanor, see Crimes.

For official bond, see s. 259.

846. When declared vacant. In case any clerk shall fail to give bond and qualify as required by law, the presiding officer of the board of commissioners of his county shall immediately inform the resident judge of the judicial district thereof, who shall thereupon declare the office vacant and fill the same, and the appointee shall give bond and qualify.

Code, s. 76; C. C. P., s. 140.

Note. Clerk can give security in lieu of bond, see Bonds, s. 234.

847. May be resigned. Any clerk of the superior court may resign his office to the judge of the superior court, residing in the district in which is situated the county of which he is clerk, and said judge shall fill the vacancy.

Const., Art. IV, s. 29; Code, s. 78.

848. When removed from. Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state.

Code, s. 123; 1868-9, c. 201, s. 53.

849. How vacancies filled. In case the office of clerk of a superior court for a county shall become vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the superior court for the county shall appoint to fill the vacancy until an election can be regularly held.

Const., Art. IV, s. 29.

850. How furnished with stationery, etc. The requisite stationery, records, furniture and filing cases and devices for official use must be furnished to the clerk by the board of commissioners; and to each of such books there must be attached an alphabetical index securely bound in the volume, referring to the entries therein by the page of the book, unless there is a cross-index of such book required by law to be kept. These books must, at all proper times, be open to the inspection of any person.

Code, ss. 82, 84, 113; C. C. P., s. 428.

851. Examined by solicitor. At every regular term of the superior court, the solicitor for the judicial district shall inspect the office of the clerk and report to the court in writing. If any solicitor shall fail or neglect to perform the duty hereby imposed on him, he shall be liable to a penalty of five hundred dollars to any person who shall sue for the same.

Code, s. 88; C. C. P., s. 147.

NOTE. Failing to keep records a misdemeanor, see Crimes.

II. DEPUTIES.

852. May be appointed. Clerks of the superior court may appoint deputies, who shall take and subscribe the oath prescribed for clerks.

Code, s. 75; R. C., c. 19, s. 15; 1777, c. 115, s. 86.

853. Record of appointment and discharge. Each clerk of a superior court shall make a record of the appointment of each deputy he may appoint, on the special proceedings docket of his court, giving the name of such appointee and the date of such appointment, and make a cross-index of the same, and shall furnish to the register of deeds of his county a transcript of such record; and such register of deeds shall record the same in the records of deeds in his office and make a cross-index thereof on the general index in his office. Whenever any such deputy clerk shall be removed from his office the clerk of the superior court by whom he was appointed shall write on the margin of the record of such appointment in his office, and on the margin of the record of such appointment in the office of the register of deeds, the word "revoked" and the date of such revocation, and sign his name thereto. A duly certified copy of such appointment and of such revocation, under the hand and official seal of the register of deeds, shall be deemed prima facie evidence of the regularity of such appointment and revocation, and shall be admitted as evidence in all the courts.

1899, c. 235, s. 3.

854. Clerk responsible for acts of. The several clerks of the superior court shall be held responsible for the acts of their deputies. Deputies shall be subject in all respects to all laws which apply to the clerks.

1899, c. 235, s. 2.

III. POWERS.

855. Enumeration of. Every clerk has power—

1. To issue subpoenas to compel the attendance of any witness residing or being in the state, or to compel the production of any bond or paper, material to any inquiry pending in his court.

2. To administer oaths and take acknowledgments, whenever necessary, in the exercise of the powers and duties of his office.

3. To issue commissions to take the testimony of any witness within or without this state.

4. To issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.

5. To enforce all lawful orders and decrees by execution or otherwise, against those who fail to comply therewith or to execute lawful

process. Process may be issued by the clerk, to be executed in any county of the state, and to be returned before him.

6. To exemplify, under seal of his court, all transcripts of deeds, papers or proceedings therein, which shall be received in evidence in all the courts of the state.

7. To preserve order in his court and to punish contempts.

8. To adjourn any proceeding pending before him from time to time.

9. To open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction.

10. To award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

11. To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or if the justice be dead by his personal representative, of all records, papers dockets and books held by such justice by virtue or color of his office and to deliver the same to the successor in office of such justice.

12. To take proof of deeds, bills of sale, official bonds, letters of attorney, or other instruments permitted or required by law to be registered.

13. To take proof of wills and grant letters testamentary and of administration.

14. To revoke letters testamentary and of administration.

15. To appoint and remove guardians of infants, idiots, inebriates and lunatics.

16. To bind out apprentices and to cancel the indentures in such cases.

17. To audit the accounts of executors, administrators, collectors, receivers and guardians.

18. To exercise jurisdiction conferred on him in every other case prescribed by law.

Code, ss. 103, 108; C. C. P., ss. 417, 418, 442.

856. When he can not exercise. No clerk can act as such in relation to any estate or proceeding—

1. If he has, or claims to have, an interest by distribution, by will, or as creditor, or otherwise.

2. If he is so related to any person having or claiming such interest, that he would, by reason of such relationship, be disqualified as a juror; but the disqualification on this ground ceases, unless the objection is made at the first hearing of the matter before him.

3. If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will; but this dis-

qualification ceases when such deed, testamentary paper, or will has been finally admitted to or refused probate by another clerk, or before the judge of the superior court.

4. If he or his wife is named as executor or trustee in any testamentary or other paper; but this disqualification ceases when the will or other paper is finally admitted to or refused probate by another clerk, or before the judge of the superior court.

5. If he shall renounce the executorship and endorse the same on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if admitted to probate.

Code, s. 104; C. C. P., s. 419; 1871-2, c. 196.

Note. Clerk can not appoint himself or deputy commissioner to sell land, see Partition, s. 2512.

857. Exercise of, on waiver of disqualification. The parties may waive the disqualification specified in subdivisions one, two, three and five of the preceding section, and upon filing in the office such waiver in writing, the clerk shall act as in other cases.

Code, s. 105; C. C. P., s. 420.

858. When can not exercise, cause removed. When any of the disqualifications specified in this chapter exist, and there is no waiver thereof, or can not be such waiver, any party in interest may apply to the judge of the district or to the judge holding the courts of such district for an order to remove the proceedings to the clerk of the superior court of an adjoining county in the same district.

Code, s. 106; C. C. P., s. 421.

Note. For probate of conveyances to which clerks are parties, see Conveyances, s. 948.

859. Exercised by judge, when. In all cases where the clerk of the superior court shall be executor, administrator, collector or guardian of any estate at the time of his election to office, in order to enable him to settle such estate, the judge of the superior court mentioned in the preceding section is empowered to make such orders as may be necessary in the settlement of the estate; may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to either of said judges for his approval, and when the accounts are so approved, it shall be his duty to order the proper record to be made by the clerk, and the accounts to be filed in court.

Code, s. 107; 1871-2, c. 197.

IV. DUTIES.

860. To receive official papers from predecessor. Immediately after he shall have given bond and qualified, the clerk shall receive from the late clerk of the superior court all the records, books, papers, moneys and property of his office, and give receipts for the same, and if any clerk shall refuse, or fail within a reasonable time after demand to deliver such records, books, papers, moneys and property, he shall be liable on his official bond for the value thereof.

Code, s. 81; C. C. P., s. 142.

Note. Failure to deliver books, records, etc., misdemeanor, see Crimes.

861. To transfer records to successor, how compelled. Upon going out of office for whatever reason, any clerk of the superior, inferior, or criminal court, shall transfer and deliver to his successor (or to such person, before his successor in office may be appointed, as the court may designate), all records, documents, papers, and money belonging to the office: And the judge appointing any clerk to a vacancy in the clerkship of the superior court, may give to such person an order for the delivery to him, by the person having the custody thereof, of the records, documents, papers and moneys belonging to the office, and he shall deliver the same in obedience to such order. And in case any clerk going out of office as aforesaid, or other person having the custody of such records, documents, papers, and money as aforesaid, shall fail to transfer and deliver them as herein directed, he shall forfeit and pay to the state one thousand dollars, which shall be sued for by the prosecuting officer of that court.

Code, s. 124; R. C., c. 19, s. 14.

862. Unperformed duties of outgoing clerk, how compelled. Whenever, upon the death or resignation, removal from office, or at the expiration of his term of office, any clerk shall have failed to discharge any of the duties of his office, the court, if practicable, shall cause the same to be performed by another person, who shall receive for such services, and as a compensation therefor, the fees allowed by law to the clerk; and such portion thereof as may be paid by the county, may be recovered by the county, by suit on the official bond of the defaulting clerk, to be brought on the relation of the board of commissioners of the county.

Code, s. 87; R. C., c. 19, s. 19; 1844, c. 5, s. 6.

863. When and where to keep office open. He shall have an office in the courthouse or other place provided by the board of commissioners, in the county town of his county. He shall give due attendance, in person or by deputy, at his office daily, Sundays and

holidays excepted, from nine o'clock, a. m., to three o'clock, p. m., and longer when necessary for the dispatch of business; and personally every Monday for the transaction of probate business, and on each succeeding day till such matters are disposed of; and upon his failure to do so, unless caused by sickness or other urgent necessity or unless leave of absence is obtained by law, he shall forfeit his office.

Code, ss. 80, 114, 115; C. C. P., s. 141; 1871-2, c. 136.

864. How leave of absence from office obtained. Upon application of any clerk of the superior court to the judge of the superior court, residing in the district in which said clerk resides, showing good and sufficient reason for said clerk absenting himself from his office, said judge may issue an order allowing said clerk to absent himself from his office for such time as said judge may deem proper: Provided, said clerk of the superior court shall at all times leave a competent deputy in charge of his office during his absence. The order of said resident judge granting relief shall be filed and recorded in the office of the clerk of the superior court of the county in which said clerk resides.

1903, c. 467.

865. To furnish blank process, bonds and undertakings. Clerks of courts shall furnish to parties printed copies of the formal parts of all process required to be issued by them, with convenient blank spaces for the insertion of written matter; and also the blank forms of such bonds and undertakings as are required to be taken by them.

Code, s. 3761; 1868-9, c. 279, s. 558.

866. How papers must be filed. The clerk must file and preserve all papers in proceedings before him, or belonging to the court; and shall keep the papers in each action in a separate roll or bundle, and at its termination attach them together, properly labeled, and file them in the order of the date of the final judgment; and all such papers and the books kept by him belong to, and appertain to, his office, and must be delivered to his successor.

Code, ss. 86, 111; C. C. P., ss. 146, 426.

867. To keep record; liable for records and papers. He shall keep in bound volumes a complete and faithful record of all his official acts, and give copies thereof to all persons desiring them, on payment of the legal fees. He shall be answerable for all records belonging to his office, and all papers filed in the court, and they shall not be taken from his custody, unless by special order of the court, or on the written consent of the attorneys of record of all the

parties; but parties may at all times have copies upon paying the clerk therefor.

Code, s. 82; C. C. P., s. 143; 1868-9, c. 159, s. 4.

868. Books to be kept. Each clerk shall keep the following books which shall be open to the inspection of the public during regular office hours:

1. **SUMMONS DOCKET**, which shall contain a docket of all writs, summonses or other original process issued by him, or returned to his office, which are made returnable to a regular term of the superior court; this docket shall contain a brief note of every proceeding whatever in each action, up to the final judgment inclusive.

2. **JUDGMENT DOCKET**, which shall contain a note of the substance of every judgment and every proceeding subsequent thereto.

3. **CIVIL ISSUE DOCKET**, which shall contain a docket of all issues of fact joined upon the pleadings, and of all other matters for hearing before the judge at a regular term of the court, a copy of which shall be furnished to the judge at the commencement of each term.

4. **CROSS-INDEX TO JUDGMENTS**, which shall contain a direct and reverse alphabetical index of all final judgments in civil actions rendered in the court, with the dates and numbers thereof, and also of all final judgments rendered in other courts and authorized by law to be entered on his judgment docket.

5. **CRIMINAL DOCKET**, which shall contain a note of every proceeding in each criminal action.

6. **MINUTE DOCKET**, which shall contain a record of all proceedings had in the court during term, in the order in which they occur, and such other entries as the judge may direct to be made therein.

7. **SPECIAL PROCEEDINGS DOCKET**, which shall contain a docket of all writs, summonses, petitions, or other original process issued by him, or returnable to his office, and not returnable to a regular term; this docket shall contain a brief note of every proceeding, up to the final judgment inclusive.

8. **MINUTE DOCKET**, which shall contain a record of all proceedings had before the clerk, in actions or proceedings not returnable to a regular term of the court.

9. **RECORD OF WILLS**, which shall contain a record of all wills, with the certificates of probate thereof.

10. **RECORD OF APPOINTMENTS**, which shall contain a record of appointments of executors, administrators, guardians, collectors and masters of apprentices, with revocations of all such appointments; and on which shall be noted all subsequent proceedings.

11. **RECORD OF ORDERS AND DECREES**, which shall contain a record of all orders and decrees passed in his office, which he is required to make in writing, and not required to be recorded in some other book.

12. RECORD OF ACCOUNTS, which shall contain a record of accounts, in which must be recorded inventories and annual accounts of executors, administrators, collectors, trustees under assignments for creditors, and guardians, as audited by him from time to time.

13. RECORD OF SETTLEMENTS, which shall contain a record of settlements, in which must be entered the final settlements of executors, administrators, collectors, trustees under assignments for creditors, and guardians.

14. RECORD OF JURORS, which shall contain a list of all persons who serve as grand, petit, and tales jurors in his court; which shall be properly indexed.

15. RECORD OF JUSTICES OF THE PEACE, which shall contain a complete list of the justices of the peace of the county, by townships, giving the date of election or appointment, qualification, and expiration of term of office of each; and whenever a vacancy occurs it shall be noted therein. These books shall at all times show a complete list of the justices of the peace of the county and who was the predecessor of each justice and the succession in office.

16. RECORD OF BOOKS, which shall contain the date of delivery to each justice of the peace of any dockets, records, and books; and the date of the receipt by him to any justice of the peace, or to the personal representative of a deceased justice of the peace, for any dockets, records and books returned to him.

17. CROSS-INDEX OF WILLS, which shall contain a general alphabetical cross-index of all wills filed or recorded in the office of the clerk of the superior court, and devising real estate or any interest therein, whether such devise appears on the face of said will or not, showing the full name of each devisor, and all devisees as they are given in the will, together with the date of the probate of such will.

18. CROSS-INDEX OF EXECUTORS AND ADMINISTRATORS, which shall contain a general alphabetical cross-index of the appointment of all executors and administrators made by the courts of their county, showing the name of the appointee, the name of the decedent, and date of appointment.

19. CROSS-INDEX OF GUARDIANS, which shall contain a general alphabetical cross-index of the appointment of all guardians made by the courts of their county, showing the name of the guardian, the names of the wards, and date of appointment.

20. RECORD OF FINES AND PENALTIES, which shall contain an itemized and detailed statement of the respective amounts received by him in the way of fines, penalties and forfeitures, and paid over to the county treasurer.

21. LIEN DOCKET, which shall contain a record of all notices of

liens filed in his office, properly indexed showing the names of the lienor and lienee.

22. RECORD OF APPOINTMENT OF RECEIVERS, which shall contain a record of all appointments of receivers, and all inventories, reports, and accounts filed by them; which shall be properly indexed.

23. RECORD OF CORPORATIONS, which shall contain a record of the certificate of incorporation of all corporations chartered under general law, with principal office or place of business in his county.

24. ACCOUNTS OF INDIGENT ORPHANS, which shall contain a record of all receipts from persons for money paid for indigent children.

25. REGISTER OF PHYSICIANS AND SURGEONS, which shall contain a list of the names and places of residence with date of registration of all persons registered by him as physicians and surgeons.

26. REGISTER OF DENTISTS, which shall contain a registration of certificates of all persons entitled to practice dentistry in his county.

27. REGISTER OF TRAINED NURSES, which shall contain the name, residence and date of registration of all trained nurses duly licensed in his county.

28. PERMANENT ROLL OF REGISTERED VOTERS, which shall contain an alphabetical list by townships of all persons entitled to permanent registration, giving the name and age of each, the name of the person from whom he was descended, unless he himself was a voter on July 1, 1867, or prior thereto, the state in which he was such voter and the date he applied for registration.

29. RECORD OF PAYMENT OF POLL TAX, which shall contain a list by townships of all persons certified to him by sheriff or tax collector as having paid their poll tax by May first.

30. LUNACY DOCKET, which shall contain a record of all examinations of persons alleged to be insane, a brief summary of the proceedings, and his findings, and a record of all proceedings in lunacy transmitted to him by justices of the peace.

Code, ss. 83, 95, 97, 112, 1789; 1893, c. 52; 1899, c. 110; 1903, c. 51; 1901, c. 2, s. 9; 1899, c. 82; 1889 c. 181, s. 4; 1887, c. 178, s. 2; 1903, c. 359, s. 6; 1901, c. 550, s. 3; 1901, c. 89, s. 13; 1899, c. 1, s. 17.

NOTE. Custodian of bonds of county officials, see s. 234.

V. REPORTS.

869. List of justices to secretary of state. The clerk of the superior court of each county in which justices of the peace are not elected by the qualified voters thereof on the first Monday in January preceding each regular session of the general assembly shall certify to the secretary of state a correct list of all justices of the peace in office in his county, the township in which each resides, the term of office

of each, time of election or appointment, and when the respective terms of office of each expires. He shall also report the names of those elected or appointed justices of the peace, but who have failed to qualify, and when their terms of office began and the length thereof.

Code, s. 89; 1901, c. 37, s. 2; 1881, c. 326.

870. Criminal statistics to attorney general. Within twenty days after the adjournment of any term of the superior court at which criminal causes were triable, the clerk thereof shall transmit to the office of the attorney general of the state a duly certified statement of the number of indictments finally disposed of at such court, specifying the number for each separate offense, the number on which convictions were had and on which defendants were acquitted, and of indictments against persons who were convicted on confession, and against persons who were discharged without trial, and also the name, age, occupation, sex, race and offense of every person convicted at such court, or pleading guilty of any offense, together with such other items of information in relation to such convicts and their offenses as the attorney general shall require, on a form prescribed by him. For every neglect of any clerk of said court he shall forfeit the sum of fifty dollars, to be adjudged in the superior court of Wake county on the motion of the attorney general, whose duty it is hereby made to make such motion at the first term of said court held after such neglect of any clerk.

1889, c. 341, ss. 1, 2, 3.

871. Of funds in hand to county commissioners. Clerks of the superior courts shall make an annual report of all public funds which may be in their hands on the first Monday in December of each and every year, or oftener, if required by order of the board of commissioners or any other lawful authority, which report shall include a statement of all funds in the hands of said clerks by virtue or color of their office, and which may belong to persons or corporations. The said report shall be made to the board of county commissioners and shall be addressed to the chairman thereof, and the said report shall give an itemized statement of said funds so held, with the date and source from which they were received, and the person to whom due, how invested and where, and in whose name deposited, giving the date of any certificate of deposit, or other evidence of investment of said fund, and the rate of interest the same is drawing, and said report shall be subscribed and verified by the oath of the party making the same before any person allowed to administer oaths.

1891, c. 580.

Note. Failure to report or swearing falsely to same a misdemeanor, see Crimes.

872. How approved, recorded, and published. The board of commissioners shall refer all itemized statements made by the clerks of the superior courts to a special committee of their board, who shall compare the same with the records of the clerk's office from which said report is made and certify the same to the board as correct, and if approved the board shall cause the same to be registered in the office of the register of deeds, in a book to be furnished to said register by the board of county commissioners, which books shall be styled "Record of Official Reports," with a proper index of all reports recorded therein, and each original report shall, if approved by the chairman of the board, be endorsed with the word "approved," the date of approval and the endorsement signed by the chairman, and when recorded by the register of deeds he shall endorse thereon the date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office. The said register shall also cause a copy of said report to be published one time in some newspaper of general circulation published in the county of said register and also posted at the courthouse door within twenty days after filing said reports; and if no newspaper is published in the county the posting of said report at the courthouse door shall be a sufficient publication. The cost of publishing said report shall be paid by the county.

Code, s. 90; 1891, c. 580, s. 3; 1893, c. 14, s. 3; 1874-5, c. 151; 1876-7, c. 276.

873. Compelled by commissioners. If any clerk shall fail to report, or if after a report has been made, the board of county commissioners shall have reason to believe that any report is incorrect, the board shall take legal steps to compel a proper report to be made by suit on the bond of such clerk, or by reporting the fact to the solicitor of the district to which the county of said board may belong for his action.

Code, s. 92; 1891, c. 580, s. 2; 1874-5, c. 151, s. 3; 1876-7, c. 276.

VI. MONEY IN HANDS OF.

874. Paid to persons entitled. The said clerks shall, on or before the first day of January in every year after the foregoing statements are made, account with and pay to the persons entitled to receive the same, all such balances reported as aforesaid to be in their hands.

Code, s. 1865; R. C., c. 73, s. 2; 1823, c. 1186, s. 2; 1831, c. 3, ss. 1, 3; 1893, c. 14, s. 1.

875. Fees of jurors and witnesses, when paid to treasurer. All moneys due jurors and witnesses which shall remain in the hands of any clerk of the superior court on the first day of January

after the publication of a third annual report of the said clerk showing the same shall be turned over to the county treasurer for the use of the school fund of the county, and it shall be the duty of said clerk to indicate in his report any moneys so held by him for a period embracing the two annual reports.

1891, c. 580, s. 4; 1893, c. 14, s. 3.

876. Used by public till called for. The money aforesaid, while held by the clerks shall be paid on application, to the persons entitled thereto; and after it shall cease to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner.

Code, s. 1869; R. C., c. 73, s. 6; 1828, c. 41, s. 1.

877. Paid indigent children, when. Whenever any moneys less in amount than twenty dollars shall be paid into court for indigent or needy children for whom no one will become guardian, upon satisfactory proof of their necessities, the clerk may pay the same upon his own motion or order to the mother or other person who has charge of said minor or to some discreet neighbor of said minor to be used for the benefit or maintenance of said minor. Such person shall be solvent and shall faithfully apply any money so paid to him or her. The clerk shall take a receipt from the person to whom the same is paid and record it in a book entitled record of amounts paid for indigent children, and the same shall be a valid acquittance for said clerk.

1899, c. 82.

NOTE. For duties as to process, see Civil Procedure.

For duties as to wrecked or stranded property, see Wrecks.

For qualification of notaries public, see s. 2358.

CHAPTER 13.

COMMISSIONERS OF AFFIDAVITS.

(Sections 878—884.)

878. Clerks and notaries authorized to take affidavits. The clerks of the supreme and superior courts and notaries public are authorized to take and certify affidavits to be used before any justice of the peace, judge or court of the state; and the affidavits so taken by a clerk shall be certified under the hands of the said clerk,

and if to be used out of the county where taken, also under the seal of the court of which they are respectively clerks, and, if by a notary, under his notarial seal.

Code, s. 631.

879. Governor appoints; term of office; powers. The governor is hereby authorized to appoint and commission one or more commissioners in any foreign country, state or republic; and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the governor, and shall have authority to take the acknowledgment or proof of any deed, mortgage or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings to be used in this state. And such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner, shall have the same force and effect for all purposes, as if the same had been made or taken before any competent authority in this state.

Code, s. 632.

880. How qualify; may administer oaths, take depositions, affidavits, etc. Every commissioner appointed by the governor aforesaid, before he shall proceed to perform any duty by virtue of this chapter, shall take and subscribe an oath before a justice of the peace in the city or county in which such commissioner shall reside well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the secretary of state. And thereupon he shall have full power and authority to administer an oath or affirmation to any person, who shall be willing or desirous to make such oath or affirmation before him, and to take depositions and to examine the witnesses under any commission emanating from the courts of this state, relating to any cause depending, or to be brought in said courts, and every deposition, affidavit, or affirmation made before him, shall be as valid as if taken before any proper officer in this state.

Code, s. 633.

881. Appointments, where recorded; certified copies evidence. It shall be the duty of the governor to cause to be recorded by the secretary of state the names of the persons who are appointed and qualified as commissioners, and for what state, territory, county, city, or town; and the secretary of state, when the oath of the commissioner shall be filed in his office, shall forthwith certify the

appointment to the several clerks of the superior courts of the state, who shall record the certificate of the secretary at length; and all removals of commissioners by the governor, and all commissioners whose commissions have expired by law, and which have not been renewed, shall be recorded and certified in like manner; and a certified copy thereof from the clerk, or a certificate of the appointment or removal aforesaid from the secretary of state, shall be sufficient evidence of the appointment or removal of such commissioner.

Code, s. 634.

882. Secretary of state to prepare and publish list in public laws. The secretary of state shall prepare and cause to be printed in each volume of the public laws a list of all persons who since the preceding publication in the public laws have been appointed commissioners of affidavits and to take the probate of deeds in any foreign country and in the several states and territories of the United States and in the District of Columbia, under this chapter, setting forth the states, territory or district or foreign country for which such persons were appointed and the dates of their respective appointments and term of office; and he shall add to each of said lists, a list of all those persons whose appointments have been renewed, revoked, or have resigned, removed or died since the date of the list previously published, as far as the same may be known to him, with the dates of such revocation, resignation, removal or death.

Code, ss. 635, 636, 637, 639.

883. Published list conclusive evidence. The list of commissioners so published in any volume of the public laws shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof.

Code, s. 638.

884. Clerks of courts of record in other states, commissioners of deeds. Every clerk of a court of record in any other state shall have full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds for this state.

Code, s. 640.

NOTE. For powers as to probate of deeds, see Conveyances, subchap. Probate.

CHAPTER 14.

COMMON LAW.

(Section 885.)

885. Common law declared to be in force. All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state.

Code, s. 641; R. C., c. 22; 1715, c. 5, ss. 2, 3; 1778, c. 133.

CHAPTER 15.

CONSTABLES.

(Sections 886—891.)

886. How elected. In each township there shall be a constable, elected by the voters thereof, who shall hold his office for two years.
Const., Art. IV, s. 24.

887. Oath of office to be taken. All constables, before they shall be qualified to act, shall take before the board of county commissioners the oaths prescribed for public officers, and also an oath of office.

Code, s. 642; R. C., c. 24, s. 8.
Note. For bond of, see s. 266.

888. Special constables appointed by justices. For the better executing any precept or mandate in extraordinary cases, any justice of the peace may direct the same in the absence of, or for want of a constable, to any person not being a party, who shall be obliged

to execute the same, under like penalty that any constable would be liable to.

Code, s. 645.

889. Vacancies filled by board of commissioners. Upon the death, failure to qualify or removal of any constable out of the township in which he was elected or appointed constable, the board of commissioners may appoint another person to fill the vacancy, who shall be qualified and act until the next election of constables.

Code, s. 646; R. C., c. 24, s. 6.

890. Powers and duties. Constables are hereby invested with, and may execute the same power and authority as they have been by law heretofore vested with, and have executed; and, in discharge of their duties, they shall execute all precepts and processes of whatever nature to them directed by any justice of the peace or other competent authority within their county or upon any bay, river, or creek adjoining thereto; and the said precepts and processes shall be returned to the magistrate, or other proper authority.

Code, s. 643; R. C., c. 24, s. 9.

891. Shall execute notices within justice's jurisdiction. Constables shall likewise execute, within the places aforesaid, all notices tendered to them, which are required by law to be given for the commencement, or in the prosecution of any cause before a justice of the peace. On demand they shall deliver the notice to the party at whose instance it was issued.

Code, s. 644; R. C., c. 24, s. 10.

See also, s. 400.

CHAPTER 16.

CONTEMPT.

(Sections 892—898.)

892. What constitutes; common law repealed. Any person guilty of any of the following acts may be punished for contempt:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Behavior of the like character committed in the presence of any referee or referees, while actually engaged in any trial or hearing pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law.

3. Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court.

4. Wilful disobedience of any process or order lawfully issued by any court.

5. Resistance wilfully offered by any person to the lawful order or process of any court.

6. The contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal and proper interrogatory.

7. The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for a contempt in publishing a true, full and fair report of any trial, argument, decision or proceeding had in court.

8. Misbehavior of any officer of the court in any official transaction.

The several acts, neglects and omissions of duty, malfeasances, misfeasances, and nonfeasances, above specified and described, shall be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be the subject of contempt of court. And if there be any parts of the common law now in force in this state which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances besides those specified and described above, the same are hereby repealed and annulled.

Code, s. 648.

393. Punishment. Punishment for contempt for matters set forth in the preceding section, shall be by fine not to exceed two hundred and fifty dollars, or imprisonment not to exceed thirty days, or both, in the discretion of the court.

Code, s. 649.

394. Court may punish summarily. Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order.

Code, s. 650.

895. Who may punish. Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court or board of commissioners of each county, or corporation commissioner, shall have power to punish for contempt while sitting for the trial of causes or engaged in official duties.

Code, ss. 651, 652.

896. Order to show cause when not committed in presence of court. Whenever the contempt shall not have been committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order, the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter.

Code, s. 653.

897. What constitutes offense punished as for contempt. Every court of record shall have power to punish as for contempt, when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court—

1. Any clerk, sheriff, register, solicitor, attorney, counsellor, coroner, constable, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or any misconduct by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed or prejudiced for disobedience of any lawful order of any court or judge, or any deceit or abuse of any process or order of any such court or judge.

2. Parties to suits, attorneys, and all other persons for the non-payment of any sum of money ordered by such court, in cases where execution can not be awarded for the collection of the same.

3. All persons for assuming to be officers, attorneys or counsellors of the court, and acting as such without authority, for receiving any property or person which may be in custody of any officer by virtue of any order or process of the court, for unlawfully detaining any witness or party to any suit, while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action.

4. All persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn, or answer, as such witness.

5. Parties summoned as jurors for impropriety, conversing with

parties or others in relation to an action to be tried at such court or receiving communication therefrom.

6. All inferior magistrates, officers and tribunals for disobedience of any lawful order of the court, or for proceeding in any matter or cause contrary to law, after the same shall have been removed from their jurisdiction.

7. All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this state to enforce the civil remedies or protect the rights of any party to an action.

Code, ss. 654, 656.

Note. Any person disobeying order of court, guilty, see s. 642.

898. Proceedings as for contempt, how prosecuted. Proceedings as for contempt shall be prosecuted and carried on, as provided in provisional remedies.

Code, s. 655.

NOTE. For refusal to produce books of corporations, see ss. 1088 et seq.

For refusal to answer questions in cases of fraud upon state, see Evidence.

CHAPTER 17.

CONVEYANCES.

| | Sections. |
|--------------------------------|-----------|
| I. Construction, | 899—902 |
| II. Officer not in office, | 903—904 |
| III. By husband and wife, | 905—911 |
| VI. Fraudulent, | 912—919 |
| V. Assignments for creditors, | 920—926 |
| IV. Contracts to be written, | 927—931 |
| VII. Registration required, | 932—941 |
| VIII. Probate, | 942—952 |
| IX. Forms, | 953—960 |
| X. Probates validated, | 961—979 |
| XI. Trustees, | 980—984 |
| XII. Chattel mortgage, | 985—987 |
| XIII. Mortgage sales, | 988—990 |
| XIV. Revocation and discharge, | 991—992 |

I. CONSTRUCTION.

899. Construed to be in fee, when. When real estate shall be conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heirs" shall be used or not,

unless such conveyance shall, in plain and express words, show, or it shall be plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity.

Code, s. 1280; 1879, c. 148.

Note. Deed and registry of destroyed, presumed to convey fee-simple, see Evidence, s. 1590.

900. Attornment unnecessary, conveyance of reversions, etc.

Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the holders of particular estates in said lands: Provided, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance.

Code, s. 1764; 4 Anne, c. 16, s. 9; 1868-9, c. 156, s. 17.

901. Vagueness of description. No deed or other writing purporting to convey land or an interest in land shall be declared void for vagueness in the description of the thing intended to be granted by reason of the use of the word "adjoining" instead of the words "bounded by," or for the reason that the boundaries given do not go entirely around the land described: Provided, it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed or paper-writing.

1891, c. 465, s. 2.

902. Conveyances to slaves. Whenever it is made to appear that any gift or conveyance has been made to any person, while a slave, of any lands or tenements, whether the same shall have been conveyed by deed or parol, and the bargainee or donee has been placed into actual possession of the same, then and in that case such gift or conveyance shall have the force and effect of transferring the legal title to the said lands and tenements to such bargainee or donee: Provided, such possession shall have continued for the term of ten years prior to the ninth day of March, one thousand eight hundred and seventy: Provided further, that any absence from the premises from the first day of May, one thousand eight hundred and sixty-one, to the first day of January, one thousand eight hundred and sixty-six, shall not be held as an abandonment or discontinuance of the possession: Provided also, that this section shall not affect the interest of a bona fide purchaser for value from the grantor or bargainor of the lands or tenements in dispute.

Code, s. 1278; 1869-70, c. 77.

II. OFFICER NOT IN OFFICE.

903. Executed by ex-officer, when. Whenever any sheriff, coroner, constable or tax collector by virtue of his office shall have sold any real or personal estate, and shall go out of office before executing a proper conveyance therefor, he may execute the same after his term of office shall have expired.

Code, s. 1267; R. C., c. 37, s. 30.

904. Executed by successor, when. Whenever any sheriff, coroner, constable or tax collector, by virtue of his office shall have sold any real or personal estate, and such officer shall die or remove from the state before executing a proper conveyance therefor, or whenever a sheriff or tax collector shall die having a tax list in his hands for collection, and his personal representative or surety, in collecting such taxes, shall make sale according to law, his successor in such office shall execute conveyances for the property so sold to the person entitled.

Code, s. 1267; 1891, c. 242.

NOTE. See also, s. 2906.

III. BY HUSBAND AND WIFE.

905. Of wife's land; how proven. Every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due acknowledgment thereof must be made by the wife, and her private examination, touching her voluntary assent to such instrument, shall be taken separate and apart from her husband, and such acknowledgment or proof as to the execution by the husband and such acknowledgment by the wife and her private examination shall be taken and certified as provided by law. Any conveyance, power of attorney, contract to convey, mortgage, deed of trust or other instrument executed by any married woman in the manner by this chapter provided and executed by her husband also, shall be valid in law to pass, bind or charge the estate right, title and interest of such married woman in and to all such lands, tenements and hereditaments or other estate, real or personal, as shall constitute the subject matter or be embraced within the terms and conditions of such instrument or purport to be passed, bound, charged or conveyed thereby.

Code, s. 1256; 1899, c. 235, s. 9; C. C. P., s. 429, subsec. 6; 1868-9, c. 277, s. 15.
Note. For forms of private examination, see ss. 955, 956.

906. Acknowledgment by, at different times and places; before different officers. In all cases of deeds or other instruments executed

by husband and wife and requiring registration, the probate of such instruments as to the husband and acknowledgment and private examination of the wife may be taken before different officers authorized by law to take probate of deeds, and at different times and places, whether both of said officials reside in this state or only one in this state and the other in another state. And in taking the probate of such instruments executed by husband and wife, including the private examination of the wife, it shall not be material whether the execution of the instrument was proven as to or acknowledged by the husband before or after the acknowledgment and private examination of the wife.

1899, c. 235, s. 9; 1895, c. 136.

907. Husband's deed registered though no private examination of wife. When an instrument purports to be signed by a husband and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, whether the private examination of the wife is properly taken or not, but no such instrument shall be the act or deed of the wife, unless her private examination is taken according to law.

1899, c. 235, s. 8; 1901, c. 637.

908. What officers can take private examinations of femes covert. When the private examination of any married woman is necessary to be taken, the officials authorized by law to take proofs and acknowledgments of the execution of any instrument are each and every one of them, hereby empowered to take the private examination of any married woman touching her free and voluntary assent to the execution of such instrument to which her assent is or may be necessary, and to certify the fact of such private examination.

1899, c. 235, s. 6.

909. Private examination procured by fraud, deed good as to innocent purchaser for value. No deed of conveyance for lands nor instrument of writing of whatever nature or kind which is required or allowed by law to be registered executed by a husband and wife since the eleventh of March, one thousand eight hundred and eighty-nine, or which may be hereafter executed by a husband and wife, if the private examination of the wife shall have been certified in the manner prescribed by law, shall be deemed or declared invalid in any case because its execution was procured by fraud, duress or other undue influence, unless it shall be shown that the grantee or person or persons to whom such instrument was or shall be made participated in the fraud, duress or other undue influence or had notice thereof before the delivery of the instrument, and where the grantee or person or persons to whom such instrument has been or shall be

made is shown to have had notice of such fraud, duress or undue influence or to have participated therein, an innocent purchaser for a valuable consideration from or under such grantee or person to whom such instrument has been or shall be made shall **not** be affected by any fraud, duress or other undue influence practiced or exercised in procuring the execution and acknowledgment of such instrument.

1889, c. 389; 1899, c. 235, s. 10.

910. Under power of attorney from. All conveyances which may be made by any person under a power of attorney from any feme covert by her freely executed with her husband, shall be valid to all intents and purposes to pass the estate, right and title which said feme covert may have in such lands, tenements and hereditaments as are mentioned or included in such power of attorney.

Code, s. 1257; R. C., c. 37, s. 11; 1798, c. 510.

911. Wife need not join in purchase-money mortgage. The purchaser of real estate who does not pay the whole of the purchase money at the time when he takes a deed for title, may make a mortgage for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his wife as well as himself, without requiring her to join in the execution of such mortgage deed.

Code, s. 1272; 1868-9, c. 204.

NOTE. For other rights of husband and wife, see *Married Women*.
For validity of marriage settlements, see s. 915.

IV. FRAUDULENT.

912. Void as to creditors. For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded), to be utterly void and of no effect;

any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead.

Code, s. 1545; 1893, c. 78; R. C., c. 50, s. 1; 50 Edw. III., c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4.

913. When void as to purchasers. Every conveyance, charge, lease or incumbrance of any lands or hereditaments, goods and chattels, if the same be made with the actual intent in fact to defraud such person as hath purchased or shall purchase in fee-simple or for lives or years the same lands or hereditaments, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or incumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alleged fraudulent conveyance, charge, lease or encumbrance shall be always deemed and taken as notice in law of the same.

Code, s. 1546; R. C., c. 50, s. 2; 27 Eliz., c. 4, s. 2; 1840, c. 28, ss. 1, 2.

914. Gifts, indebtedness evidence of fraud. No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred: and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper.

Code, s. 1547; R. C., c. 50, s. 3; 1840, c. 28, ss. 3, 4.

915. Marriage settlements, as to existing creditors. Every contract and settlement of property made by any man and woman in consideration of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage, if the same is antenuptial, or at the time of making such contract or settlement, if the same is postnuptial.

Code, ss. 1270, 1820; 1871-2, c. 193, s. 11; R. C., c. 37, s. 25; 1785, c. 238, s. 2.

916. Bona fide conveyances to innocent purchaser for value, valid. Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, bona fide made, upon and for good consideration, to any person not having notice of such fraud.

Code, s. 1548; R. C., c. 50, s. 4; 13 Eliz., c. 5, s. 6; 1785, c. 7, s. 6.

917. Innocent purchaser for value protected against illegal consideration. No conveyance or mortgage, made to secure the payment of any debt or the performance of any contract or agreement, shall be deemed void as against any purchaser for valuable or other good consideration of the estate or property conveyed, sold, mortgaged or assigned, by reason that the consideration of such debt, contract or agreement shall be forbidden by law, if such purchaser, at the time of his purchase, shall not have had notice of the unlawful consideration of such debt, contract or agreement.

Code, s. 1549; R. C., c. 50, s. 5; 1842, c. 70.

918. Purchasers entitled to remedy of creditors. Purchasers of estates previously conveyed in fraud of creditors or purchasers shall have like remedy and relief as creditors might have had before the sale and purchase.

Code, s. 1550; R. C., c. 50, s. 6.

919. Persons removing debtors to defraud creditors, liable as debtor. If any person shall remove or shall aid and assist in removing any debtor out of any county in which he shall have resided for the space of six months or more, with the intent, by such removing, aiding or assisting to delay, hinder or defraud the creditors or any of them of such debtor, the person so removing, aiding or assisting therein, and his executors or administrators, shall be liable to pay all the debts which the debtor removed may justly owe in the county from which he was so removed; and the same may be recovered by the creditors, their executors or administrators by a civil action.

Code, s. 1551; R. C., c. 50, s. 14; 820, c. 1063.

V. ASSIGNMENTS FOR CREDITORS.

920. Debts mature on execution of; schedule of preferred debts filed. Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once; a schedule of all preferred debts shall be filed under oath by the assignor in the office of the clerk of the superior court of the county in which such assignment is made, stating the name of preferred creditors, the amount due each, when the debt was made, and the circumstances under which said debt was contracted, and said schedule shall be filed within five days of the registration of such deed of assignment.

1893, c. 453.

921. Inventories filed within ten days. Upon the execution of such deed of trust, the trustee, whether named therein or appointed as hereafter provided for, shall file with the clerk of the superior court of the county in which said deed of trust is registered, within ten days after the registration thereof, an inventory under oath, giving a complete, full and perfect account of all property that has come into his hands or to the hands of any person for him, by virtue of such deed of trust, and whenever further property of any kind not included in any previous return shall come to the hands or knowledge of such trustee he shall return the same as hereinbefore prescribed within ten days after the possession or discovery thereof.

1893, c. 453, s. 2.

922. Insolvent trustee without bond removed by clerk. Upon the complaint of any creditor of the assignor or trustee in such deed of trust, alleging under oath that the trustee named therein is insolvent and asking that he be required to give bond or be removed, it shall be the duty of the clerk of the superior court of the county in which such deed of trust is registered, upon a notice of not more than ten days to such trustee, to hear said complaint; and if upon such hearing said clerk shall be satisfied that such trustee is insolvent, it shall be his duty to remove such trustee and to appoint some competent person to execute the provisions of such deed of trust, unless such insolvent trustee shall file with said clerk a good and sufficient bond, to be approved by said clerk, in a sum double the value of the property in said deed of trust, payable to the state of North Carolina, and conditioned that such trustee shall faithfully execute and carry into effect the provisions of said deed of trust.

1893, c. 453, s. 3.

923. Substituted trustee to give bond. Upon the removal of such insolvent trustee it shall be the duty of the clerk to require

the person appointed to execute the provisions of such deed of trust, before entering upon his duties, to file with the clerk a good and sufficient bond, to be approved by the clerk in a sum double the value of the property in said deed of trust, payable to the state of North Carolina, and conditioned that such person shall faithfully execute and carry into effect the provisions of said deed of trust.

1893, c. 453, s. 3.

924. Only perishable property sold within ten days from registration. It shall be unlawful for any trustee, whether named in such deed of trust or appointed by a clerk of the superior court, to sell any part of the property described in such deed of trust within ten days from the registration thereof, unless such property or some part thereof be perishable, in which case he may sell such property as is perishable, according to the powers conferred upon him in said deed of trust.

1893, c. 453, s. 4.

925. Creditors to file verified statements with trustee. All creditors of the maker of such deed of trust shall, before receiving payment of any amount from the said trustee, file with the said trustee a statement under oath that the amount claimed by him is justly due, after allowing all credits and offsets, to the best of his knowledge and belief.

1893, c. 453, s. 6.

926. Trustee to file quarterly accounts; close trust in twelve months. The trustee, whether named in the deed of trust or appointed by a clerk of a superior court, shall within three months from the registration of such deed of trust, file with the clerk of the superior court of the county in which the same is registered an account under oath, stating in detail his receipts and disbursements and his action as trustee, and at each succeeding period of three months he shall file a like account, and within twelve months he shall file his final account of his administration of his trust. The clerk of the superior court shall have power upon good cause shown to extend the time within which the quarterly and final accounts herein provided for are to be filed.

1893, c. 453, s. 5.

NOTE. For violation of duty by trustee, see Crimes.
For false statements by creditors, see Crimes.

VI. CONTRACTS TO BE WRITTEN.

927. Charging executor personally, or one with debt of another.

No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum, or note thereof shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Code, s. 1552; R. C., c. 50, s. 15; 1826, c. 10; 29 Charles II., c. 3, s. 4.

928. With Indians. All contracts and agreements of every description made with any Cherokee Indian, or any person of Cherokee Indian blood within the second degree, for an amount equal to ten dollars or more, shall be void, unless some note or memorandum thereof be made in writing and signed by such Indian or person of Indian blood, or some other person by him authorized, in the presence of two witnesses, who shall also subscribe the same.

Code, s. 1553; R. C., c. 50, s. 16.

929. For sale or lease of land. All contracts to sell or convey any lands, tenements or hereditaments or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands, exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

Code, ss. 1554, 1743; R. C., c. 50, s. 11; 29 Ch. II., c. 3, ss. 1, 2, 3; 1819, c. 1016; 1844, c. 44; 1868, c. 156, ss. 2, 33.

Note. See s. 933.

930. Sales of liquors on credit. No retail liquor dealer shall sell to any person, on credit, liquors to a greater amount than ten dollars, unless the person credited sign a book or note, in the presence of a witness, in acknowledgment of the debt, under the penalty of losing the money so credited; and in any action brought for recovery of such debt the matter of defense allowed by this section may be set up in the answer and given in evidence.

Code, s. 1555; R. C., c. 79, s. 4; 1798, c. 501, s. 6.

931. Promise to revive debt of bankrupt. No promise to pay a debt discharged by any decree of a court of competent jurisdiction,

in any proceeding in bankruptcy, shall be received in evidence unless such promise shall be in writing and signed by the party to be charged therewith.

1899, c. 57.

NOTE. For requirement that new promise bars statute of limitations, see Civil Procedure, s. 333.

VII. REGISTRATION REQUIRED.

932. Probate and registration supplies livery of seizin. All deeds, contracts or leases, before registration, except those executed prior to January first, one thousand eight hundred and fifty-five, shall be acknowledged by the grantor, lessor or the person executing the same, or their signatures proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony whatever.

Code, s. 1245; 1885, c. 147, s. 3; 29 Ch. II., c. 3; R. C., c. 37, s. 1; 1715, c. 7; 1756, c. 58, s. 3; 1838-9, c. 33.

933. Conveyances, contracts to convey, and leases of land. No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth: Provided, the provisions of this section shall not apply to contracts, leases or deeds executed prior to March first, one thousand eight hundred and eighty-five, until the first day of January, one thousand eight hundred and eighty-six; and no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, one thousand eight hundred and eighty-five, when the person holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his tenant at the time of the execution of such second deed, or when the person, claiming under or taking such second deed, had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder.

Code, s. 1245; 1885, c. 147, s. 1.

934. Deeds executed prior to January first, one thousand eight hundred and fifty-five. Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, one thousand eight hundred and fifty-five, may have the same registered without proof of the execution thereof: Provided, that such

person shall make an affidavit before the officer having jurisdiction to take probate of such deed, that the grantor, bargainor or maker of such deed, and the witnesses thereto are dead or can not be found, and that he can not make proof of their handwriting. Said affidavit shall be written upon or attached to such deed, and the same, together with such deed shall be entitled to registration in the same manner and with the same effect as if proven in the manner prescribed by law for other deeds.

1885, c. 147, s. 2.

935. Mortgages and deeds of trust. No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth; or in case of personal estate where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor shall reside out of the state, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides.

Code, s. 1254; R. C., c. 37, s. 22; 1829, c. 20.

936. Conditional sales of personal property. All conditional sales of personal property in which the title is retained by the bargainor, shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in case the purchaser shall reside out of the state, then in the county where the said personal estate or some part thereof is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides.

Code, s. 1275; 1891, c. 240; 1883, c. 342.

937. Conditional sales of railroad property. Whenever any railroad equipment and rolling stock shall hereafter be sold, leased or loaned on the condition that the title to the same, notwithstanding the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessor or bailor until the terms of the contract, as to the payment of the installments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with; such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice, unless—

1. The same shall be evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.

2. Such writing shall be registered as mortgages are registered, in

the office of the register of deeds in each county in which such vendee, lessee or bailee does business.

3. Each locomotive or car so sold, leased or loaned shall have the name of the vendor, lessor or bailor, or the assignee of such vendor, lessor or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee, as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, one thousand eight hundred and eighty-three.

Code, s. 2006; 1883, c. 416.

938. Marriage settlements. All marriage settlements and other marriage contracts, whereby any money or other estate shall be secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration.

Code, ss. 1269, 1270, 1821; 1885, c. 147; R. C., c. 37, ss. 24, 25; 1785, c. 238; 1871-2, c. 193, s. 12.

939. Deeds of gift. All deeds of gift of any estate of whatever nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration.

Code, s. 1252; 1885, c. 147; R. C., c. 37, s. 18; 1789, c. 315, s. 2.

940. Powers of attorney. Every power of attorney, wherever made or concerning whatsoever matter, may on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or estate which it concerns is situate, if such power of attorney relate to the conveyance thereof; if it does not relate to the conveyance of any estate or property then in the county in which the attorney resides or the business is to be transacted.

Code, s. 1249; 1899, c. 235, s. 15.

941. Certified copies may be registered; used as evidence. A duly certified copy of any deed or writing, required or allowed to be registered, may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the state.

Code, s. 1253; 1858-9, c. 18, s. 2.

Note. For records of court to prove deed, see ss. 300, 301.

VIII. PROBATE.

942. Before what officers. The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases and any and all instruments and writings of whatsoever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proven or acknowledged before any one of the following officials of this state: The several justices of the supreme court, the several judges of the superior court, commissioners of affidavits appointed by the governor of this state, the clerk of the supreme court, the several clerks of the superior court, the deputy clerks of the superior courts, the several clerks of the criminal courts, notaries public, and the several justices of the peace.

Code, s. 1246; 1899, c. 235; 1895, c. 161, ss. 1, 3; 1897, c. 87.

943. Before what nonresident officers. The execution of all such instruments and writings as are permitted or required by law to be registered may be proven or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: any judge of a court of record, any clerk of a court of record, any notary public, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul or commercial agent of the United States. And the execution of all such instruments may be proven or acknowledged before any justice of the peace of any state or territory of the United States. If the proof or acknowledgment of the execution of an instrument be had before a justice of the peace of any state of the United States other than this state or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate.

1899, c. 235, s. 5.

Note. See Commissioners of Affidavits; Notaries Public.

944. By commissioner appointed by clerk, maker nonresident. Whenever it shall appear to the clerk of the superior court of any

county that any person nonresident of this state is desirous of acknowledging a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he shall issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and privy examination of a married woman separate and apart from her husband, touching her assent to any power of attorney, deeds or other conveyances, touching real estate in said county. The commissioner shall make certificate of the acknowledgments or proof and privy examination made by him, and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved, and that such examination is in due form, and shall order the same to be registered.

Code, s. 1258; 1869-70, c. 185.

945. Before justice of county other than where land lies; clerk's certificate. If the proof of acknowledgment of any instrument shall be had before a justice of the peace of any county other than the county in which such instrument is offered for registration, the certificate of proof or acknowledgment made by such justice of the peace shall be accompanied by the certificate of the clerk of the superior court of the county in which said justice of the peace resides, that such justice of the peace was at the time his certificate bears date an acting justice of the peace of such county, and that such justice's genuine signature is set to his certificate. The certificate of the clerk of the superior court herein provided for shall be under his hand and official seal.

1899, c. 235, s. 4.

946. Seal of probating officer, when. When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment and such official has an official seal he shall set his official seal to his certificate. If the official before whom the instrument is proven or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proven or acknowledged before the clerk or deputy clerk of the superior court of the county in which the instrument is to be registered the official seal shall not be necessary.

1899, c. 235, s. 8.

947. Taken anywhere. The execution of any and all instruments required or permitted by law to be registered may be proven or acknowledged before any of the officials authorized by law to

take probates, regardless of the county in this state in which the subject matter of the instrument may be situated and regardless of the domicile, residence or citizenship of the person who executes such instrument, or of the domicile, residence or citizenship of the person to whom or for whose benefit such instrument may be made.

1899, c. 235, s. 13.

948. When clerk is a party. All instruments required or permitted by law to be registered to which clerks of the superior court are parties or in which such clerks are interested, may be proved or acknowledged and privy examination of any married woman, when necessary, taken before any justice of the peace of the county of said clerk, which clerk may then, under his hand and official seal, certify to the genuineness thereof, or before any judge of the superior court or justices of the supreme court, and the said instrument probated and ordered to be registered by such judge or justice in like manner as is provided by law for probates by clerks of the superior court in other cases.

1891, c. 102; 1893, c. 3.

Note. See proviso, s. 952.

949. Subscribing witness, or maker subpœnaed, when. The grantee or other party to an instrument required or allowed by law to be registered may at his own expense obtain from the clerk of the superior court of the county in which the instrument is required to be registered a subpœna for any or all of the makers of or subscribing witnesses to such instrument, commanding such maker or subscribing witness to appear before such clerk at his office at a certain time to give evidence concerning the execution of the instrument. Such subpœna shall be directed to the sheriff of the county in which the person upon whom it is to be served resides. If any person refuses to obey such subpœna he shall be liable to a fine of forty dollars and to be attached for contempt by the clerk, upon its being made to appear to the satisfaction of the clerk that such disobedience was intentional, under the same rules of law as are prescribed in the cases of other defaulting witnesses.

Code, s. 1268; 1899, c. 235, s. 16; 1897, c. 28.

950. Proof of witness' handwriting, when. If an instrument required or permitted by law to be registered have a subscribing witness and such witness be dead or out of the state, or of unsound mind, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of such subscribing witness or of the handwriting of the maker but this shall not be proof of the execution of instruments by married women.

1899, c. 235, s. 12.

951. Proof of maker's handwriting, when. If any instrument required or permitted by law to be registered have no subscribing witness, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker or makers, but this shall not apply to proof of execution of instruments by married women.

1899, c. 235, s. 11.

952. Clerk or deputy must pass on certificate of other officer. Whenever the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the clerk or deputy clerk of the superior court of the county in which such instrument is offered for registration, the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration shall, before the same shall be registered, examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it shall appear that the instrument has been duly proven or acknowledged and the certificate or certificates to that effect are in due form he shall so adjudge and shall order the instrument to be registered together with the certificates: Provided, that if the clerk of the superior court is a party to or interested in such instrument such adjudication and order of registration shall be made by his deputy or by the clerk of the superior court of some other county of this state, or by some justice of the supreme court of this state or some judge of the superior court of this state.

1899, c. 235, s. 7.

IX. FORMS.

953. Adjudication and order of registration. The form of adjudication and order of registration required by the preceding section shall be substantially as follows:

North Carolina, County.

The foregoing (or annexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

This....day of....., A. D.....

.....
(Signature of officer.)

1899, c. 235, s. 7.

954. Acknowledgment by grantor. Where the instrument shall be acknowledged by the grantor or maker, the form of acknowledgment shall be in substance, as follows:

North Carolina, County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the ... day of (year).

(Official seal.)

.....

(Signature of officer.)

955. Private examination of wife. When an instrument purports to be signed by a married woman, the form of certificate of her acknowledgment and private examination before any officer authorized to take the same, shall be in substance as follows:

North Carolina, County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this....(day of month), A. D.....(year).

(Official seal.)

.....

(Signature of officer.)

1899, c. 235, s. 8; 1901, c. 637.

956. Private examination and acknowledgment by husband. Where the instrument shall be acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance, as follows:

North Carolina, County.

I (here give name of official and his official title), do hereby certify that (here give name of the grantors whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument, and the said (here give name of the married woman or women), wife (or wives) of (here give name of husband or husbands), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed

the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this....(day of month), A. D.....(year).

(Official seal.)

.....

(Signature of officer.)

1899, c. 235, s. 8; 1901, c. 299.

957. Corporate conveyances. The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate, which would be deemed sufficient in law. If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, County.

This .. day of, A. D., personally came before me (here give the name and official title of the officer who signs this certificate), A. B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C. D., who is the president (or presiding member or trustee), and also with E. F. and G. H., two other members of said corporation; and that he, the said A. B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this.... day of, (year).

(Official seal.)

.....

(Signature of officer.)

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

(1)

North Carolina, County.

This .. day of, A. D., personally came before me (here give name and official title of the officer who signs the certificate) A. B. (here give the name of the attesting secretary), who

being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C. D., who is the president of said corporation, and that he, the said A. B., is the secretary of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A. B., secretary as aforesaid, affixed said seal to said instrument), and that he, the said A. B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the....day of (year).

(Official seal.)

.....

(Signature of officer.)

(2)

North Carolina, County.

This is to certify that on the .. day of before me personally came (president, vice-president or secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that is the president (or vice-president), and is the secretary of the, the corporation described in, and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the.. day of (year).

(Official seal.)

.....

(Signature of officer.)

1899, c. 235, s. 17; 1901, c. 2, s. 110.

Note. For validation of all corporate probates prior to February 18, 1901, see s. 977.

959. Clerk's certificate upon probate by justice of peace. When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a justice of the peace of this state but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina, County.

I, A. B. (here give name and official title of a clerk of a court of record) do hereby certify that C. D. (here give the name of the justice of the peace taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace in and for the county of and state (or territory) of, and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this.. day of, A. D.

(Official seal.)

.....

(Signature of officer.)

1899, c. 235, s. 8.

960. Clerk's certificate upon probate by nonresident officer without seal. When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and such official have no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

North Carolina, County.

I, A. B. (here give name and official title of the clerk of a court of record as provided in this act), do hereby certify that C. D. (here give name of the official taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate a (here give the official title of the officer taking proof, etc.), in and for the county of and state of (or other political division of the state, territory or country as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, thisday of.....A. D.....

(Official seal.)

.....

(Signature of clerk.)

1899, c. 235, s. 8.

X. PROBATES VALIDATED.

961. Errors in registration, corrected. Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to cor-

rect errors in grants or patents, and if on hearing the same before said clerk, it appears that errors have been committed, the clerk shall order the register of the county to correct such errors and make the record conformable to the original: Provided, that such petitioner shall have notified his grantor and every person claiming title to, or having lands adjoining those mentioned in the petition, thirty days previous to preferring the same: Provided further, that any person dissatisfied with the judgment may appeal to the superior court as in other cases.

Code, s. 1266; R. C., c. 37, s. 28; 1790, c. 326, ss. 2, 3, 4.

962. Taken by judges supreme or superior court, or deputy clerks. Wherever the judges of the supreme or the superior court, or the clerks or deputy clerks of the superior court, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the first day of January, one thousand eight hundred and eighty-nine, to take the probate of deeds or any instrument required or allowed by law to be registered, and the privy examination of femes covert, whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations so taken and had, are validated. This section shall apply to all conveyances of whatever kind required by law or allowed to be registered.

Code, s. 1260; 1871-2, c. 200, s. 1; 1889, c. 252; 1891, c. 484.

963. Where registered on order of judge, clerk being party. All deeds, mortgages or other instruments which prior to the twentieth day of January, one thousand eight hundred and ninety-three, have been probated by a justice of the peace, and ordered to registration by a judge of the superior court or justice of the supreme court to which clerks of the superior court are parties are hereby confirmed, and the probates and orders for registration declared to be valid.

1893, c. 3, s. 2.

964. Notary having certified under his private seal. In every case, prior to the sixth day of January, one thousand nine hundred and three, where a notary public, residing in this state or any other state, has taken the acknowledgment of any deed, mortgage or other instrument requiring registration or the privy examination of a married woman, or proof of the execution of such deed, mortgage or other instrument by witness, and has certified such acknowledgment, privy examination or proof, without the use of his official or notarial seal, and the clerk of the court has adjudged such certificate to be in due form and has ordered such deed, mortgage or other instru-

ment to be registered, and the same has been registered, every such certificate is hereby declared to be in all respects valid.

1899, c. 66; 1903, c. 513.

965. Where secretary of state instead of governor has certified to officer. In all cases, where any deed concerning lands or any power of attorney for the conveyance of the same, or any other instrument required or allowed to be registered, has been, prior to the twenty-ninth day of January, one thousand nine hundred and one, acknowledged by the grantor therein, or proven and the private examination of any married woman, who was a party thereto, taken according to law, before any judge of a supreme, superior or circuit court, of any other state or territory of the United States, where the parties to such instrument resided, and the certificate of such judge as to such acknowledgment, probate or private examination and also the certificate of the secretary of state of said state or territory instead of the governor thereof (as required by the laws of this state then in force); that the judge, before whom the acknowledgment or probate and private examination were taken, was at the time of taking the same a judge as aforesaid, are attached to said deed, or other instrument, and the said deed or other instrument, having said certificates attached, has been exhibited before the former judge of probate, or the clerk of the superior court of the county in which the property is situated and such acknowledgment, or probate and private examination have been adjudged by him to be sufficient and said deed, or other instrument ordered to be registered and has been registered accordingly such probate and registration shall be valid: Provided, that nothing herein contained shall affect the rights of third parties, who are purchasers for value, without notice from the grantor in such deed or other instrument.

1901, c. 39.

966. Where clerks interested. The probate and registration of all deeds, mortgages and other instruments requiring registration, prior to the eighth day of February, one thousand eight hundred and ninety-nine, to which the clerks of the superior courts are parties or in which they have an interest and which have been registered on the order of such clerks on proof of acknowledgment taken before such clerks or justices of the peace be and the same are hereby declared valid.

1891, c. 102; 1899, c. 258.

967. Where "previously" has been used instead of "privately." All probates of deeds, letters of attorney or other instruments requiring registration to which married women were parties, had and taken prior to the fourteenth day of February, one thousand eight hundred

and ninety-three, in which probates it appears that such married women were “previously examined” instead of “privately examined,” are hereby validated and confirmed.

1893, c. 130.

968. Probate in wrong county; by wife before husband. The probate and registration of all deeds and other instruments requiring registration taken by a justice of the peace in the county other than that in which the grantor or subscribing witness resided, and all probates of instruments executed by a husband and wife in which the probate as to the husband has been taken before or subsequent to the privy examination of his wife are validated.

1893, c. 293.

969. Acknowledgments before different officers. Where, prior to the second day of March, one thousand eight hundred and ninety-five, the probate of a deed or other instrument, executed by husband and wife, has been taken as to the husband and the wife by different officers having the power to take probates of deeds, whether both officers reside in this state, or one in this state and the other in another state, the said probate, in the cases mentioned, shall be valid to all intents and purposes, and all deeds and other instruments required to be registered, and which have been ordered to registration by the proper officer in this state, and upon such probate or probates, and have been registered, shall be taken and considered as duly registered and the word “probate,” as used in this section, shall include privy examination of the wife.

1895, c. 120.

970. Acknowledgment by resident beyond state. In all cases, prior to the ninth day of March, one thousand eight hundred and ninety-five, when a deed or mortgage executed by a resident of this state has been proven or acknowledged by the maker thereof before a notary public of any other state of the United States, and said deed or mortgage has been ordered to be registered by the clerk of the superior court of the county in which the land conveyed by such deed or mortgage is situated, and said deed or mortgage has been registered, such registration shall be valid and binding.

1895, c. 181.

971. By clerks of criminal courts in Buncombe county. Whenever clerks of the criminal courts of Buncombe county have, prior to the second day of February, one thousand eight hundred and ninety-three, essayed to take the probate of any deed, letter of attorney or other instrument requiring registration, and the private examination of *femes covert* whose names are signed to such deeds, and

have ordered said deeds to registration, and the same have been registered, all such probates, private examinations and registrations so taken and had shall be valid and binding.

1893, c. 13.

972. By clerks of inferior courts. All probates and orders of registration made by and taken before any clerk of any inferior, or criminal court, prior to the twentieth day of February, one thousand eight hundred and eighty-five, and valid in form and substance, shall be valid and effectual, and all deeds, mortgages or other instruments requiring registration, registered upon such probate and order of registration, shall be valid. This section shall apply only to the counties of Halifax, Northampton, Hertford, Buncombe, Mecklenburg, Granville, Beaufort, Lenoir, Robeson, Cumberland, Ashe, Martin, Wayne, Greene, Iredell, Bertie, Edgecombe, Duplin and New Hanover.

1885, cc. 105, 108; 1889, c. 143; 1889, c. 463.

973. Before notary or clerk of court of record of another state.

All deeds and conveyances made for lands in this state, which have previous to February fifteenth, one thousand eight hundred and eighty-three, been proven before a notary public or clerk of a court of record of any other state, and such proof having been duly certified by such notary or clerk taking the proof as aforesaid, under the official seal of such notary public or court of record, and such deed or conveyance so proven and certified, with the certificate of having been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of the registration of such deed or conveyance, shall be sufficient registration of the same, and such proof and registration shall be adjudged good and valid in law.

Code, s. 1262; 1885, c. 11; 1883, c. 129, s. 1.

974. Evidence under preceding section. All deeds and conveyances proven, certified and registered under the preceding section, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands shall come in controversy, and further registration of such deeds and conveyances so proven and registered shall not be necessary.

Code, s. 1263; 1883, c. 129, s. 2.

975. Under form previously legal. Where deeds or other instruments have heretofore been acknowledged by husband and wife or by other grantors pursuant to any form of acknowledgment which

was then lawful, such acknowledgment is hereby declared to be sufficient and valid.

1901, c. 299, s. 2.

976. Proof of handwriting of grantor refusing to acknowledge.

All registrations of instruments, prior to February fifth, one thousand eight hundred and ninety-seven, permitted or required by law to be registered, which were ordered to registration upon proof of the handwriting of the grantor or maker who refused to acknowledge the execution, are hereby validated.

1897, c. 28.

977. Proof of corporate articles of agreement. All proofs of articles of agreement for the creation of corporations which were, prior to the eighteenth day of February, one thousand nine hundred and one, made before any officer who was at that time authorized by the law to take proofs and acknowledgments of deeds and mortgages are ratified and declared valid.

1901, c. 170.

978. By de facto officers in Greene. The probate of all instruments requiring registration made by Alexander Taylor while acting as and being the de facto clerk of the superior court of Greene county during the month of December, one thousand eight hundred and ninety-eight, and during the year one thousand eight hundred and ninety-nine, are hereby declared valid; and the registration of all instruments requiring registration as made by W. E. Murphrey while acting as the de facto register of deeds of Greene county, during the month of December, one thousand eight hundred and ninety-eight, and during the year one thousand eight hundred and ninety-nine, are hereby declared valid.

1901, c. 369.

979. By clerks of wrong county. All deeds acknowledged or proven, prior to January twenty-first, one thousand eight hundred and ninety-one, by the grantor, maker or subscribing witness before any clerk of the superior court or of the inferior or criminal court, or before a notary public or justice of the peace of a county within this state wherein the land conveyed did not lie, and where said grantor, maker or subscribing witness did not reside, are declared sufficiently proven and the registration valid.

1891, c. 12.

NOTE. Appointment and discharge of deputies, see Clerk Superior Court, ss. 852, 853.

Clerks responsible for acts of deputies in probating conveyances, see Clerk Superior Court, s. 854.

For law making property of corporations under mortgage liable for certain debts, see s. 527.

XI. TRUSTEES.

980. Trustee or mortgagee dead, personal representative executes power. When the mortgagee in a mortgage, or the trustee in a deed in trust executed for the purpose of securing a debt containing a power of sale, shall die before the payment of the debt secured in such mortgage or deed in trust, all the rights, powers and duties of such mortgagee or trustee, shall pass to and devolve upon the executor or administrator of such mortgagee or trustee: Provided, that the administrator or executor of a trustee shall not execute the powers conferred by this section, except upon the written request of any creditor secured in or by the deed of trust.

1901, c. 186; 1887, c. 147; 1895, c. 431.

981. Surviving mortgagee executes power. In all mortgages and deeds of trust wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons shall be dead, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding, as if the same had been done by all the persons on whom the power was conferred.

1885, c. 327, s. 2.

982. Power executed by agent, appointed orally or by writing. All sales of property, real or personal, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, by such mortgagee or trustee, appointed orally or in writing, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee shall have been or shall be present at such sale.

1895, c. 117.

983. Infant trustees convey, how. Whenever any infant shall be seized or possessed of any estate whatever in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, or may be declared to be seized or possessed, in the course of any proceeding in the superior court, the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age.

Code, s. 1265; R. C., c. 37, s. 27; 1821, c. 1116, ss. 1, 2.

984. When clerk appoints a new trustee. When any trustee named in a will or deed of trust has died, removed from the county where the deed was executed and from the state, or in any way become incompetent to execute the said trust, or is a nonresident of this state, the clerk of the superior court of the county wherein the said deed of trust was executed is authorized and empowered, upon proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the said deed of trust according to its true intent and meaning, and as fully as if appointed by the parties to the deed: Provided, that in all actions or proceedings had under this section prior to January first, one thousand nine hundred, before the clerks of the superior court in which any trustee was appointed to execute a deed in trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the state, or in any way become incompetent to execute the said trust, whether such appointment of such trustees by order or decree, or otherwise, was made upon the application or petition of any person or persons ex-parte, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings.

Code, s. 1276; 1901, c. 576; 1869-70, c. 183; 1873-4, c. 126.

XII. CHATTEL MORTGAGE.

985. Form of. Any person indebted to another in a sum to be secured, not exceeding at the time of executing the deed herein provided for the sum of three hundred dollars, may execute a chattel mortgage in form substantially that which follows:

I,, of the county of in the state of North Carolina, am indebted to, of county, in said state, in the sum of.....dollars, for which he holds my note to be due the....of....., A. D. 19...., and to secure the payment of the same, I do hereby convey to him these articles of personal property, to-wit:.....
but on this special trust, that if I fail to pay said debt and interest on or before the....day of..... A. D. 19...., then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days' notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me. Given under my hand and seal, this .. day of, A. D. 19.... [Seal.]

Code, s. 1273; 1870-1, c. 277.

986. Registration of, notice of sale under. Such chattel mortgage shall be good to all intents and purposes when the same shall be duly registered according to law, but no sale thereunder shall be made without giving at least twenty days public notice of the time and place of such sale.

Code, ss. 1273, 1274; 1870-1, c. 277, ss. 1, 2.

Note. For fees for probate and registration, see *Salaries and Fees*.

For joinder of chattel mortgage and lien bond, see *Liens*, s. 2035.

987. Mortgages of household and kitchen furniture. All conveyances of household and kitchen furniture by a married man, made to secure the payment of money or other thing of value, shall be void, unless the wife join therein and her privy examination be taken in the manner prescribed by law in conveyances of real estate.
1891, c. 91.

NOTE. For lien bonds, see *Liens*.

For fees for, see *Salaries and Fees*.

XIII. MORTGAGE SALES.

988. Advertised at courthouse door. All property, real and personal, sold under the terms of any mortgage or other contract, expressed or implied, whether advertised in some newspaper or otherwise, shall be advertised by posting a notice at some conspicuous place at the courthouse door in the county where the property is situated, such notice to be posted for at least twenty days before the sale, unless a shorter time be expressed in the contract.

1889, c. 70.

Note. For notice of sale under chattel mortgage, see s. 986.

989. Description of property in advertisements. In sales of real estate under deeds of trust or mortgages, it shall be the duty of the trustee or mortgagee making such sale to fully describe the premises in the notice required by law, substantially as the same is described in the deed or authority under which said trustee or mortgagee makes such sale.

1895, c. 294.

990. Power of sale barred when. The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors, shall become inoperative, and no person shall execute any such power, when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations. Wherever an action to foreclose any such mortgage or deed of trust is now barred by the statute of limitations, the authority to execute the power of sale contained therein shall be barred on the first day of January, one thousand nine hundred and seven.

XIV. REVOCATION AND DISCHARGE.

991. Deeds to persons not in esse revoked. The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse, may at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interests for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner.

1893, c. 498.

992. Mortgages and deeds of trust released, how. Any deed of trust or mortgage which hath been or which hereafter may be registered in the manner required by law, may be discharged and released in the following manner, to-wit:

1. The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon it shall be the duty of the register or his deputy forthwith to make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the said trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto; or,

2. Upon the exhibition of any mortgage, deed in trust or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee or assignee of the same, the said register or his deputy shall cancel the mortgage or other instrument by entry of "satisfaction" on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond and mortgage or other instrument: Provided, if the register or his deputy shall require it he shall file a receipt to him showing by whose authority the mortgage or other instrument was cancelled.

Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage, as if a deed of release or reconveyance thereof had been duly executed and recorded.

Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; 1870-1, c. 217.

CHAPTER 18.

CORONERS.

(Sections 993—999.)

993. How elected; clerk appoints for special cases. In each county a * * * coroner shall be elected by the qualified voters thereof, as is prescribed for members of the general assembly, and shall hold their offices (his office) for two years. * * * When there is no coroner in a county, the clerk of the superior court for the county may appoint one for special cases.

Const., Art. IV, s. 24. (In case of a vacancy the county commissioners appoint, s. 1268.)

994. Oath of office to be taken. Every coroner, before entering upon the duties of his office, shall take and subscribe to the oaths prescribed for public officers, and an oath of office.

Code, s. 661.

995. Vacancy, clerk may appoint special. Whenever there is a vacancy existing in the office of coroner in any county, and it shall be made to appear by the affidavit of some responsible person that a deceased person whose body has been found within the county probably came to his death by the criminal act or default of some person, it shall be the duty of the clerk of the superior court of such county to appoint some suitable person as special coroner to hold an inquest over the body of the deceased.

1903, c. 661.

996. Powers, penalties and liabilities of special. The special coroner appointed under the provisions of the preceding section shall be invested with all the powers and duties conferred upon the several coroners in respect to holding inquests over deceased bodies, and shall be subject to the penalties and liabilities imposed on the said coroners.

1903, c. 661, s. 2.

997. Holds inquests; when physician summoned. It shall be the duty of the several coroners, whenever it is made to appear, by the affidavit of some responsible person, that the deceased probably came to his death by the criminal act or default of some person or persons, to go to the place where the body of such deceased person is and forthwith to summon a jury of six good and lawful men: whereupon the coroner, upon oath of said jury at the said place, shall make inquiry when, how and by what means such deceased person

came to his death, and his name if it was known, together with all the material circumstances attending his death. And if it shall appear that the deceased was slain, then who was guilty either as principal or accessory, if known, or in any manner the cause of his death. And as many persons as are found culpable, by inquisition in manner aforesaid, shall be taken and delivered to the sheriff and committed to jail; and such persons as are found to know anything of the matters aforesaid and are not culpable themselves, shall be bound in a recognizance with sufficient surety to appear at the next superior court to give evidence; of all which matters and things the coroner must make a record of his inquisition signed by the jurors, and return the same to the next superior court of his proper county. It shall be the duty of every coroner, when the jury investigating the case shall require it, to summon a physician or surgeon, except that in Buncombe county, when the coroner is a physician or surgeon, he shall, if requested by one or more of the jurors, make the investigation: Provided, that before any coroner is authorized to hold any inquest in Northampton county the affidavit mentioned in this section shall be made before the clerk of the superior court, when said clerk in the exercise of his discretion shall direct an order to the sheriff to notify the coroner to proceed to hold the inquest in accordance with law.

Code, s. 657; 1903, c. 586; 1899, c. 478.

998. Acts as sheriff, when; special coroner. If at any time there be no person properly qualified to act as sheriff in any county, the coroner of such county is hereby required to execute all process and in all other things to act as sheriff, until some person shall be appointed sheriff in said county; and such coroner shall be under the same rules and regulations, and subject to the same forfeitures, fines, and penalties as sheriffs are by law, for neglect or disobedience of the same duties. And if at any time the sheriff of any county be interested in or a party to any proceeding in any court, and if there be no coroner in such county, or if the coroner be interested in any such proceeding, then the clerk of the court from which such process issues shall appoint some suitable person to act as special coroner to execute such process, and such special coroner shall be under the same rules, regulations and penalties as hereinabove provided for.

Code, s. 658; 1891, c. 173.

999. Compensation of jurors at inquest. All persons who may be summoned to act as jurors in any inquest held by a coroner over dead bodies, and who, in obedience thereto, shall appear and act as such jurors, shall be entitled to the same compensation in per diem and mileage as is allowed by law to jurors acting in the superior

courts. The coroners of the respective counties are hereby authorized and empowered to take proof of the number of days of service of each juror so acting and also of the number of miles traveled by such juror in going to and returning from such place of inquest, and shall file with the board of commissioners of the county a correct account of the same, which shall be, by such commissioners, audited and paid in the manner provided for the pay of jurors acting in the superior courts.

Code, ss. 659, 660.

NOTE. For bond of, see Bonds, s. 263.

CHAPTER 19.

CORPORATIONS.

| | Sections. |
|---|-----------|
| I. General powers, | 1000—1006 |
| II. Legislative control, | 1007—1008 |
| III. Formation, | 1009—1016 |
| IV. By-laws, | 1017—1018 |
| V. Officers, | 1019—1030 |
| VI. Capital stock, | 1031—1046 |
| VII. Amendm'ts, surrender, etc., and extension, | 1047—1051 |
| VIII. Corporate meetings, | 1052—1063 |
| IX. Dividends, | 1064—1065 |
| X. Foreign corporations, | 1066—1067 |
| XI. Dissolution, | 1068—1084 |
| XII. Execution, | 1085—1091 |
| XIII. Receivers, | 1092—1105 |
| XIV. Taxes and fees, | 1106—1110 |
| XV. Reorganization, | 1111—1114 |
| XVI. Miscellaneous provisions, | 1115—1120 |

I. GENERAL POWERS.

- 1000. Corporate powers.** Every corporation shall have power—
1. To have succession, by its corporate name, for the period limited in its charter, or certificate of incorporation, and, when no period is limited, for a period of sixty years.
 2. To sue and be sued in any court.
 3. To make and use a common seal, and alter the same at pleasure.
 4. To hold, purchase and convey real and personal estate in or out of the state, and to mortgage the same and its franchises; the power to hold real and personal estate shall include the power to take the same by devise or bequest.

5. To elect and appoint in such manner as it shall determine to be proper, all necessary officers and agents, and fix their compensation and define their duties and obligations.

6. To conduct business in this state, other states, the District of Columbia, the territories, dependencies and the colonies of the United States, and in foreign countries, and have one or more offices in or out of this state.

7. To make by-laws and regulations, consistent with the laws of the state, for its own government, and for the due and orderly conduct of its affairs and the management of its property.

8. To wind up and dissolve itself, or be wound up and dissolved in the manner hereafter mentioned.

Code, ss. 663, 666, 690, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1.

1001. Implied powers; how far this chapter affects all corporations. In addition to the powers enumerated in the first section of this chapter, and the powers specified in its charter, or in the act or certificate under which it was incorporated, every corporation, its officers, directors and stockholders, shall possess and exercise all the powers and privileges contained in this chapter so far as the same are necessary or convenient to the attainment of the objects set forth in such charter or certificate of incorporation, and shall be governed by the provisions, and be subject to the restrictions and liabilities in this chapter contained, so far as the same are applicable to, and not inconsistent with, such charter, or the act under which such corporation was formed; and no corporation shall possess or exercise any other corporate powers, except such incidental powers as shall be necessary to the exercise of the powers so given: Provided, nothing in this chapter shall authorize or empower corporations organized under this chapter to lease, operate, maintain, manage or control any railroad except street railways.

Code, s. 701; 1897, c. 204; 1901, c. 2, s. 4; 1901, c. 6.

1002. How land conveyed; certain conveyances void as to torts. Any corporation may convey lands, and all other property which is transferable by deed, by deed of bargain and sale, or other proper deed, sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and two other members of the corporation and attested by a witness or witnesses, or by deed of bargain and sale, or other proper deed, sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and attested by the secretary of the company. But any conveyance of its property, whether absolutely or upon condition, in trust, or by way of mortgage, executed by any corporation, shall be void and of no effect as to torts committed by such corporation prior to, or at the time of the

execution of said deed: Provided, persons injured, or their representatives, shall commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed, as required by law.

Code, s. 685; 1891, c. 118; 1893, c. 95, s. 2; 1899, c. 235, s. 17; 1901, c. 2, s. 2; 1903, c. 660, s. 1.

1003. Mortgaged corporate property subject to execution for labor and torts. Mortgages of corporations upon their property or earnings, whether in bonds or otherwise, shall not have power to exempt the property or earnings of such corporations from execution for the satisfaction of any judgment obtained in courts of the state against such corporations for labor performed, nor torts committed by such corporation whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding.

Code, s. 1255; 1897, c. 334; 1901, c. 2, s. 3.

1004. Gas companies may supply electricity. Any gas company, in addition to the powers contained in the charter, shall have full power to use, employ and supply electricity for lighting public and private buildings and all other places; and may charge, and collect such reasonable rates and fees for the use of such lights, fixtures and appliances as may be established by said company, in accordance with law.

1889 (Pr.), c. 35.

1005. Special powers of gas and electric companies. Gas and electric light and power companies shall have power to lay, extend, construct, build, erect, maintain, repair and remove all necessary or convenient towers, poles, cable wires, conductors, lamps, fixtures, appliances, appurtenances, in, upon, through and over any and all roads, streets, avenues, lanes, alleys and bridges within and near any city, town or village where said company may be located; and all such roads, streets, lanes, alleys and bridges shall be left in as good condition as they were in at the time of using them as aforesaid: Provided, that the rights and privileges conferred in this section shall not be exercised unless the authorities of such city, town or village first give their consent, and afterwards the said authorities shall have full power to control the location of all towers, poles, wires, conductors and all other fixtures, appliances and appurtenances belonging to or operated by any of said companies.

1889 (Pr.), c. 35, s. 2.

1006. Corporations created hereunder can not do banking business. No corporation created under the provisions of this chapter, shall, by any implication or construction, be deemed to possess

the power of carrying on the business of discounting bills, notes or other evidences of debt, or of receiving deposits of money, or of buying gold or silver bullion, or foreign coins, or of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan, or for circulation as money: Provided, that in the transaction of its business it may make, and take and indorse, when necessary, all such bonds, notes and bills of exchange, as the particular business may require.

Code, s. 684; 1901, c. 2, s. 5.

II. LEGISLATIVE CONTROL.

1007. Legislative power over corporate charters. The charter of every corporation, or any supplement thereto, or amendment thereof, shall be subject to alteration, modification, amendment or repeal, in the discretion of the legislature, and the legislature may, at pleasure, dissolve any corporation.

Const., Art VIII, s. 1; 1901, c. 2, s. 6.

1008. This chapter may be amended; corporations bound thereby; appropriate portions a part of all charters. This chapter may be amended or repealed at the pleasure of the legislature, and every corporation shall be bound by such amendment; but such amendment or repeal shall not take away or impair any remedy against any such corporation, or its officers, for any liability which shall have been previously incurred. This chapter and all amendments thereof shall be a part of the charter of every corporation heretofore formed, or hereafter formed hereunder, except so far as the same are inapplicable and inappropriate to the objects of such corporation.

Const., Art. VIII, s. 1; 1901, c. 2, s. 7.

III. FORMATION.

1009. How created. Any number of persons, not less than three, who may be desirous of engaging in any business, or of forming any company, society or association whatever, not unlawful, except railroads, other than street railways, or banking or insurance, or building and loan associations, shall be incorporated in the manner following, and in no other way (except in those cases where, in the judgment of the legislature, the object of the corporation can not be attained under the general law, and in all such cases the act creating the corporation shall contain a preamble, in which shall be set forth specifically and definitely the particular object of the corporation, or provision in the proposed charter, which can not be attained under the

general law); that is to say, such persons shall, by a certificate of incorporation, under their hands, and seals, set forth—

1. The name of the corporation; no name shall be assumed already in use by another existing corporation of this state, or so nearly similar thereto as to lead to uncertainty or confusion; and shall end with either the word "company," or the word "incorporated."

2. The location of its principal office in the state.

3. The object or objects for which the corporation is formed.

4. The amount of the total authorized capital stock of the corporation, the number of shares into which the same is divided, and the par value of each share, the amount of capital stock with which it will commence business, and, if there be more than one class of stock, a description of the different classes, with the terms on which the respective classes of stock are created: Provided, however, that the provisions of this paragraph shall not apply to religious, charitable or literary corporations, unless it is desired to have a capital stock; in case any religious, charitable or literary corporation desires to have no capital stock, it shall be so stated, and the conditions of membership shall be also stated.

5. The names and postoffice addresses of the subscribers for stock, and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of capital stock with which the company will commence business; and if there be no capital stock, the names and postoffice addresses of the incorporators

6. The period, if any, limited for the duration of the company.

7. The certificate of incorporation may also contain any provision which the incorporators may choose to insert for the regulation of the business, and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders: Provided, such provision be not inconsistent with the laws of this state.

Code, s. 677; 1901, c. 2, s. 8; 1903, c. 453; 1901, cc. 6, 41, 47; 1885, cc. 19, 190; 1889, c. 170; 1891, c. 257; 1893, cc. 244, 318; 1897, c. 204; 1899, c. 618.

1010. Street railways may be incorporated hereunder. Corporations may be organized under the provisions of this chapter, for the purpose of building, maintaining or operating street railways. The term street railways, wherever used in this chapter, shall be held to include railways operated either by steam or electricity, or by whatever motive power, used and operated as means of communication between different points in the same municipality, or between points in municipalities lying adjacent or near to each other, or between the territory lying contiguous to the municipality in which is the home office of said company, and such railways may carry and deliver freights: Provided, that no such railway shall operate

a line extending in any direction more than fifty miles from the municipality in which is located its home office. No such railway shall be operated in any city or town without the consent of the municipal authorities thereof.

1901, cc. 6, 41; 1903, c. 350.

1011. Certificate of incorporation, how signed, proved, filed and recorded. The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved, or acknowledged, before an officer duly authorized under the laws of this state to take the proof or acknowledgment of deeds. Such certificate of incorporation, when so proved, shall be filed in the office of the secretary of state, and there remain of record, and he shall, if the same shall be in accordance with law, thereupon cause the same to be recorded in his office in a book to be kept for that purpose, and known as the "Corporation Book," and he shall, upon the payment of the organization tax and fees, certify under his official seal, a copy of the said certificate of incorporation and probates, which said certified copy shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of said corporation in this state shall, or is to be established, in a book to be known as the "Record of Incorporations;" and said certificate of incorporation, or a copy thereof, duly certified by the secretary of state, or by the clerk of the superior court of the county in which the same is recorded, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established.

Code, ss. 678, 679, 682; 1901, c. 2, s. 9; 1903, c. 343.

1012. When incorporators become a corporation. The persons so associated, their successors and assigns, shall, from the date of such filing in said office of the secretary of state, be and constitute a body corporate by the name set forth in such certificate of incorporation, subject to amendment and dissolution in the manner provided by law.

1901, c. 2, s. 10.

1013. Incorporators to direct affairs until directors are elected. Until the directors are elected, the signers of the certificate of incorporation shall have the direction of the affairs and of the organization of the corporation, and may take such steps as are proper to obtain the necessary subscription to stock and to perfect the organization of the corporation.

1901, c. 2, s. 11.

1014. First meeting, how called. The first meeting of every corporation shall be called by a notice, signed by a majority of the incorporators, designating the time, place, and purpose of the meeting, which notice shall be published at least two weeks before the meeting, in some newspaper of the county where the corporation is established; or said first meeting may be called without publication, if two days' notice be personally served on all the incorporators, or if all the incorporators shall in writing waive notice and fix a time and place of meeting, no notice or publication shall be required.

Code, s. 665; 1901, c. 2, s. 18.

1015. Death of incorporators; vacancy filled. When one or more of the incorporators of any corporation, created by or under any general or special act, shall have died before the corporation shall have been organized pursuant to law, the survivors or survivor may, in writing, designate other persons who may take the place and act instead of those deceased, in the organization; and the organization so effected by their aid shall be as effectual in law as if it had been effected by all the original incorporators.

1901, c. 2, s. 36.

1016. Errors in certificates of incorporation, how corrected. Whenever in the certificate of incorporation under any general law there shall be any error or omission in the recital of the act under which said corporation is created, or in the omission of any other matter which is required to be stated in the certificate, it shall be lawful for said corporation to correct such error in the manner following: The board of directors of such corporation shall pass a resolution declaring that such error exists, and that said corporation desires to correct the same, and shall call a meeting of the stockholders of said corporation to take action upon such resolution. The meeting of said stockholders shall be held upon such notice as the by-laws provide, and in the absence of such provision, then upon ten days' notice, given personally, or by mail. If two-thirds in interest of all the stockholders shall vote in favor of the correction of such error or omission, a certificate of such action shall be made and signed by the president and secretary under the corporate seal; which said certificate shall be acknowledged or proved as in the case of deeds of real estate, and such certificate, together with the written assent, in person or by proxy, of two-thirds in interest of all the stockholders of said corporation, shall be filed in the office of the secretary of state, and upon the filing thereof the certificate of incorporation shall be deemed to be corrected and amended accordingly, and the filing of said certificate in conformity with this chapter shall have the same force and effect as if said certificate of incorporation had been originally drafted in conformity with the amendment so made.

1901, c. 2, s. 109.

IV. BY-LAWS.

1017. Power to make and alter. The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors. By-laws made by the directors under power so conferred may be altered or repealed by the stockholders.

1901, c. 2, s. 13.

1018. What they may determine and contain. All corporations may, by their by-laws, where no other provision is specially made, determine the manner of calling and conducting all meetings; the number of members that shall constitute a quorum (provided, in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum; if the quorum shall not be so determined by the corporation, a majority in interest of the stockholders, represented either in person, or by proxy, shall constitute a quorum) the number of shares that shall entitle the members to one or more votes; the mode of voting by proxy; the mode of selling shares for the nonpayment of assessments; the tenure of office of the several officers, and the manner in which vacancies in any of the offices shall be filled, till a regular election, and they may annex suitable penalties to such by-laws, not exceeding in any case the sum of twenty dollars, for any one offense: Provided, that no such by-law shall be made by any corporation repugnant to any provision of its certificate of incorporation; and the provisions of this chapter shall govern in all cases where the by-laws are silent.

Code, s. 664; 1901, c. 2, s. 12.

V. OFFICERS.

1019. Directors, their selection, powers, duties, terms of office, classes, etc. The business of every corporation shall be managed by its directors; they shall not be less than three in number, and, except as hereinafter provided, they shall be chosen annually by the stockholders at the time and place provided in the by-laws, and shall hold office for one year and until others are chosen and qualified in their stead; but by so providing in its certificate of incorporation, any corporation organized under this chapter may classify its directors in respect to the time for which they shall severally hold office, the several classes to be elected for different terms: Provided, that no class shall be elected for a shorter period than one year, or for a longer period than five years, and that the term of office of at least one class shall expire in each year. Any corporation which shall have more than one kind of stock, may, by so providing in its certificate

of incorporation, confer the right to choose the directors of any class upon the stockholders of any class, or classes, to the exclusion of the others. One director of every corporation of this state shall be an actual resident of this state, and it shall not be necessary for more than one director to be a resident of this state, notwithstanding the provisions of any special charter or other act.

1901, c. 2, s. 14.

1020. Directors must be stockholders. No person shall be elected as director of any corporation issuing stock unless he shall be, at the time of his election, a bona fide holder of some of the stock thereof; and any director ceasing to be a bona fide holder of some of the stock thereof, shall cease to be a director. Any corporation may, by its certificate of incorporation or by-laws, determine how many shares a person shall hold to qualify him to be a director.

1901, c. 2, s. 44.

1021. Officers, their selection, qualifications, duties, terms, etc. Every corporation organized under this chapter shall have a president, secretary and treasurer, who shall be chosen either by the directors or stockholders, as the by-laws may direct, and shall hold their offices until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as shall be assigned to him. The treasurer may be required to give bond for the faithful discharge of his duty in such sum, and with such surety, or sureties, as shall be required by the by-laws. Any two of the offices may be held by the same person, if the body electing so determine.

1901, c. 2, s. 15.

1022. Other officers, agents and factors. The corporation may have such other officers, agents and factors, who shall be chosen in such manner and hold their office for such terms, and upon such conditions as may be prescribed by the by-laws or determined by the board of directors.

1901, c. 2, s. 16.

1023. Vacancies, how filled. Any vacancy occurring among the directors, or in the office of president, secretary or treasurer, by death, resignation, removal or otherwise, shall be filled in the manner provided for in the by-laws; in the absence of such provision such vacancies shall be filled by the board of directors.

1901, c. 2, s. 17.

1024. Annual statement after elections; forfeiture for failure to make; duty of secretary of state and attorney general. Every corporation, authorized to transact business in this state, shall file in the office of the secretary of state, annually, on or before March first, a statement authenticated by the signatures of the president and secretary, containing the names of all of the directors, and officers, with the date of the election or appointment, term of office, residence and postoffice address of each, the character of its business and location, giving the street and number; if any, of its principal office in the state, and the name of the agent in charge of said office, upon whom process against the corporation may be served; but this shall not prevent service of process on other agents authorized by law; and for this purpose the secretary of state shall furnish blanks in proper form and safely keep in his office all such statements, and issue to the corporations filing the same, his certificate thereof, and also prepare an alphabetical index thereof, which statements and index shall be submitted to the inspection of persons interested, at all proper hours; and every corporation failing to comply with the provisions of this section, shall forfeit to the state one hundred dollars, to be recovered, with costs, in an action to be prosecuted by the attorney general, who may prosecute such actions whenever it shall appear that this section has been violated. This section shall not apply to any corporation which is required to file a similar statement in the office of the commissioner of insurance, or the corporation commission.

1901, c. 2, s. 48.

1025. Secretary of state may call for special reports. The secretary of state shall have power to call for special reports from corporations, of the same character as their regular reports, at such times as he may deem public interest requires: Provided, no fees shall be charged for filing such special reports.

1026. Liability for making false certificates. If any certificate made, or any public notice given by the officers of any corporation, in pursuance of the provisions of this chapter, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false shall be jointly and severally liable for all the debts of the corporation contracted while they were stockholders or officers thereof, as a penalty enforceable in the courts of this state only.

1901, c. 2, s. 56.

1027. Fraud, liability of officers, directors and stockholders for. In case of fraud by the president, directors, managers or stockholders, in any corporation, the court shall adjudge personally liable

to creditors and others injured thereby such of the directors and stockholders as may have been concerned in the fraud.

Code, s. 686; 1901, c. 2, s. 107.

1028. Who may sue officers and directors personally. When the officers, directors or stockholders of any corporation shall be liable to pay the debts of the corporation, or any part thereof, any person to whom they are liable may have an action against any one or more of them.

1901, c. 2, s. 90.

1029. Action by officer for money advanced. Any officer, director or stockholder who shall pay any debt of a corporation for which he is made liable by the provisions of this chapter, may recover the amount so paid, in an action against the corporation for money paid for its use, in which action only the property of the corporation shall be liable to be taken, and not the property of any stockholder.

1901, c. 2, s. 91.

1030. Assets of corporation first exhausted. No sale or other satisfaction shall be had of the property of any director or stockholder for any debt of the corporation of which he is such director or stockholder till judgment be obtained therefor against such corporation and execution thereon returned unsatisfied, or it shall be made to appear to the court that the corporation has no property available for the satisfaction of said indebtedness.

1901, c. 2, s. 92.

VI. CAPITAL STOCK.

1031. Classes of stock; issued for property or labor. Every corporation shall have power to create two or more kinds of stock of such classes, with such designations, preferences and voting powers or restriction or qualification thereof as shall be prescribed by those holding two-thirds of its capital stock outstanding; and the power to increase or decrease the stock, as herein elsewhere provided, shall apply to all or any of the classes of stock; and such preferred stock may, if desired, be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the certificate thereof; and the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, payable quarterly, half yearly, or yearly, before any dividend shall be set apart or paid on the common stock, and such dividends may be made cumulative; and in case of insolvency, its debts or other liabilities shall be paid in preference to the preferred stock. No corporation shall create preferred stock, except by authority given to the board of directors,

by a vote of at least two-thirds of the stock voted at a meeting of the common stockholders, duly called for that purpose. The terms "general stock" and "common stock" are synonymous. When any corporation shall issue stock for labor done or personal property or real estate, or leases thereof, which stock may be so issued by any corporation, in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive.

1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3.

1032. Capital stock, how paid; loans to stockholders. Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this chapter, except as herein provided in case of the purchase of property or labor performed, and no loan of money shall be made to a stockholder or officer thereof; and if any such loan be made, the officers who make it, or assent thereto, shall be jointly and severally liable, to the extent of such loan, and interest, for all the debts of the corporation until the repayment of the sum so loaned.

1901, c. 2, s. 53.

1033. Stock issued full-paid for property purchased; statements to contain the facts. Any corporation formed under this chapter may purchase mines, manufactories or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of actual fraud the judgment of the directors as to the value of the property shall be conclusive; and in all statements and reports of the corporation to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the facts.

1901, c. 2, s. 54. See also, s. 1031.

1034. Stockholders, liability for stock not fully paid; fiduciaries and pledgors. Where the capital stock of a corporation shall not have been paid in, and the assets shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the certificate of incorporation or charter, or such proportion of that sum as shall be required to satisfy such debts and obligations; but no person holding stock in any corporation in this state as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security shall be per-

sonally subject to any liability as a stockholder of such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, guardian, or trustee, shall be liable in like manner, and to the same extent, as the testator or intestate, or the ward, or the person interested in such fund, would have been, had he been living and competent to act and hold the stock in his own name.

1893, c. 471; 1901, c. 2, s. 22.

1035. Certificate of payment of, to secretary of state. The president and secretary, or treasurer, upon payment in full of each installment of the capital stock, and of every increase thereof, shall make a certificate, stating the amount of the capital so paid, and whether paid in cash or by the purchase of property, or in payment for labor, stating also the total amount of capital stock, if any, previously paid and reported, which certificate shall be signed and sworn to by the president and secretary, or treasurer, and they shall, within ten days after such payment, cause the certificate to be filed in the office of the secretary of state.

1901, c. 2, s. 26.

1036. Liability of officers failing to make certificate. If any of the officers shall neglect or refuse to make any reports required of them by law for thirty days after written request so to do by a creditor or stockholder of the corporation, they shall be jointly and severally liable for all its debts contracted before the filing of such certificate.

1901, c. 2, s. 27.

1037. Decrease of capital stock, how effected; liability of directors and stockholders. The decrease of capital stock may be effected by retiring or reducing any class of the stock, or by drawing the necessary number of shares by lot for retirement, or by the surrender by every shareholder of his shares, and the issue to him in lieu thereof of a decreased number of shares, or by the purchase at not above par of certain shares for retirement, or by retiring shares owned by the corporation, or by reducing the par value of shares; and when any corporation shall decrease the amount of its capital stock as hereinbefore provided, the certificate decreasing the same shall be published for three weeks successively, at least once in each week, in a newspaper published in the county in which the principal office of the corporation is located; the first publication to be made within fifteen days after the filing of such certificate, and in default thereof the directors of the corporation shall be jointly and severally liable for all the debts of the corporation contracted

before the filing of the said certificate, and the stockholders shall also be liable for such sums as they may respectively receive of the amount so reduced: Provided, no such decrease of capital stock shall release the liability of any stockholder, whose shares have not been fully paid, for debts of the corporation theretofore contracted.

1901, c. 2, s. 32.

1038. Certificates of stock. Every stockholder shall have a certificate signed by the president and treasurer, or secretary, certifying the number of shares owned by him in such corporation.

1901, c. 2, s. 20.

1039. Duplicate certificates issued by directors. Every corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the directors authorizing such issue of a new certificate may, in their discretion, require the owner of the lost or destroyed certificate, or his legal representatives, to give the corporation a bond, in such sum as they may direct, as an indemnity against any claim that may be made against such corporation. A new certificate may be issued without requiring any bond when, in the judgment of the directors, it is proper so to do.

1885, c. 265; 1901, c. 2, s. 94.

1040. Action to compel issuance of duplicate certificate. Whenever any corporation shall have refused to issue a new certificate of stock in place of one theretofore issued by it, or by any corporation of which it is a successor, alleged to have been lost or destroyed, the owner of the lost or destroyed certificate or his legal representatives may maintain a civil action in the superior court of the county in which the principal office of the corporation is located to compel such corporation to issue a duplicate certificate of stock in the place of the certificate alleged to have been lost or destroyed; and if the issues of fact arising upon the pleadings shall be found in favor of the plaintiff, the court shall make an order requiring the corporation or other party, within such time as it shall designate, to issue and deliver to the plaintiff a new certificate for the number of shares of the capital stock of the corporation which shall have been found to be owned by the plaintiff; in making the order the court shall direct that the plaintiff deposit such security as to the court shall appear sufficient to indemnify any person other than the plaintiff, who shall thereafter appear to be the lawful owner of such certificate stated to be lost or destroyed; and the court may also direct publication of such notice, either preceding or succeeding the making of such final order, as it shall deem proper. Any person who shall thereafter claim any rights under the certificate so lost or

destroyed shall have recourse to said indemnity, and the corporation shall be discharged from all liability to such person by reason of compliance with the order.

1901, c. 2, s. 95.

1041. Shares, personal property; how transferred; held as collateral. The shares of stock in every corporation shall be personal property, and shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer.

Code, s. 689; 1901, c. 2, s. 21.

1042. Assessments upon shares. The directors of every corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof, remaining unpaid; and the sums so assessed shall be paid to the treasurer at such times and by such installments as the directors shall direct, said directors having given thirty days' notice of the assessment and of the time and place of payment, either personally or by mail, or by publication in a newspaper published in the county where the corporation is established.

1901, c. 2, s. 23.

1043. Shares sold to pay assessments. If the owner of any shares shall neglect to pay any sum assessed thereon for thirty days after the time appointed for payment, the treasurer, when ordered by the board of directors, shall sell, at public auction, such numbers of the shares of the delinquent owner as will pay all assessments then due from him, with interest, and all necessary incidental charges, and shall transfer the shares sold to the purchaser, who shall be entitled to a certificate therefor.

1901, c. 2, s. 24.

1044. Notice of sale. The treasurer shall give notice of the time and place appointed for the sale, and of the sum due on each share, by advertising the same three weeks successively, once in each week, before the sale, in some newspaper published in the county where the principal office of the corporation is located, at the courthouse door, and by mailing a notice thereof to the last known postoffice address of the delinquent stockholder.

1901, c. 2, s. 25.

1045. Certain construction companies may take stock and bonds for labor, materials, etc.; statements to contain the facts. Corporations having for their object the building, constructing or

repairing of railroads, water, gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like works of internal improvement or public use, or utility, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporation formed for the purpose of constructing, maintaining and operating any such public works; and the directors of any such corporation formed for the purpose of constructing, maintaining and operating any public work of the description aforesaid may accept in payment of any such subscription, or purchase, real or personal property, necessary for the purposes of such corporation, or work, labor and services performed, or materials furnished to, or for, such corporation to the amount of the value thereof, and from time to time issue upon any such subscription or purchase, in such installments or proportions as such directors may agree upon, full-paid stock, in full or partial performance of the whole, or any part of such subscription or purchase, and the stock so issued shall be full-paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payments. And in all statements and reports of the corporation to be published or filed, this stock shall not be stated, or reported, as being issued for cash paid to the corporation, but shall be reported and published in this respect according to the fact.

1901, c. 2, s. 55.

1046. One corporation may hold stock and securities of another. Any corporation may purchase, hold, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this or any other state, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

1903, c. 660, s. 3.

VII. AMENDMENTS, SURRENDER AND EXTENSION.

1047. Amendments before payment of stock. It shall be lawful for the incorporators of any incorporation, before the payment of any part of its capital, to file with the secretary of state an amended certificate of incorporation, duly signed by the incorporators named in the original certificate of incorporation, and duly acknowledged or proved, modifying, changing or altering the original certificate of incorporation in whole, or in part, which amended certificate of incorporation shall take the place of the original certificate of incorporation, and when recorded in the proper county shall be deemed to have been filed and recorded on the date of filing and recording the original certificate of incorporation: Provided, the

officers shall be entitled to the same fees for filing and recording the amended certificate of incorporation as if they were original; but there shall be charged no additional organization tax, except when the certificate of incorporation is amended by increasing the capital stock, in which event, an additional organization tax shall be paid upon such increase.

1901, c. 2, s. 28.

1048. Amendments, generally. Every corporation, whether organized under a special act of incorporation, or under general laws, and which might now be created under the provisions of this chapter, may change the nature of its business, relinquish one or more branches thereof, or extend its business to such other branches as might have been inserted in its original certificate of incorporation, change its name, increase its capital stock, decrease its capital stock, change the par value of the shares of its capital stock, extend its corporate existence, create one or more classes of preferred stock, and make such other amendment, change or alteration as may be desired, in manner following: The board of directors shall pass a resolution declaring that such change or alteration is advisable, and call a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such provisions, upon ten days' notice, given personally or by mail; if two-thirds in interest of each class of the stockholders having voting powers shall vote in favor of such amendment, change or alteration, a certificate thereof shall be signed by the president and secretary, under the corporate seal, acknowledged or proved, as in the case of deeds to real estate, and such certificate, together with the written assent, in person or by proxy, of two-thirds in interest of each class of such stockholders, shall be filed in the office of the secretary of state, and upon such filing they shall be recorded in the county in which the original certificate of incorporation is recorded, and thereupon the certificate of organization shall be deemed to be amended accordingly: Provided, that such certificate of amendment, change or alteration, shall contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment, and the certificate of the secretary of state, under his official seal, that such certificate and assent have been filed in his office shall be taken and accepted as evidence of such change, or alteration, in all courts and places. And any corporation which could not now be created under the provisions of this chapter may in like manner increase or decrease its capital stock, or change its name.

1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 29, 30; 1903, c. 510.

1049. Change of location of principal office. The board of directors of any corporation, organized under the laws of this state, may change the location of the principal office of such corporation within this state to any other place within this state, by resolution adopted at a regular or special meeting of such board, by the votes of at least two-thirds of the members of such board: Provided, that no certificate shall be required to be filed of the removal of any office from one point to another in the same town, township or city of the state. Upon the adoption of a resolution as aforesaid, a copy thereof shall be filed in the office of the secretary of state, signed by the president and secretary of such corporation, and sealed with its corporate seal.

1901, c. 2, s. 31.

1050. Surrender of corporate rights before payment of stock. The incorporators named in any certificate of incorporation, before the payment of any part of the capital stock, and before beginning the business for which the corporation was created, may surrender all their corporate rights and franchises, by filing in the office of the secretary of state a certificate verified by oath, that no part of the capital stock has been paid and such business has not been begun, and surrendering all rights and franchises, and thereupon the said corporation shall be dissolved.

1901, c. 2, s. 35.

1051. Extension of corporate existence. Any corporation, created by special charter, or under the general law, for any objects which are allowed by this chapter may extend its corporate existence in the manner prescribed herein: Provided, that if such corporation possesses franchises, powers, privileges, immunities or advantages which could not be obtained under this act, such extension shall not continue, renew or extend such franchises, powers, privileges, immunities or advantages, but the filing of the certificate of extension shall operate as a waiver and abandonment of such franchises, powers, privileges and advantages.

1901, c. 2, s. 37.

VIII. CORPORATE MEETINGS.

1052. Place of meetings; books at principal office; jurisdiction superior court over books. The meetings of the stockholders of every corporation of this state shall be held at the principal office in this state. The directors may hold their meetings, and have an office and keep the books of the corporation (except the stock and transfer books) outside of the state. Every corporation shall maintain a principal office in this state, and have an agent in charge thereof,

wherein shall be kept the stock and transfer books for the inspection of all who are authorized to see the same, and for the transfer of stock. The superior court may, upon proper cause shown, order any or all of the books of said corporation to be forthwith brought within this state, and kept therein at such place and for such time as may be designated in such order, and the charter of any corporation failing to comply with such order may be declared forfeited by the court making such order. And it shall thereupon cease to be a corporation, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of such order.

1901, c. 2, s. 49.

1053. Transfer and stock books at principal office; only evidence as to stockholders, when; directors' duties. Every corporation shall keep at its principal and registered office in this state the transfer books, in which the transfer of stock shall be registered, and the stock books, which shall contain the names and addresses of the stockholders, the number of shares held by them respectively, which shall at all times during the usual hours for business be open to the examination of every stockholder; and the books aforesaid shall be the only evidence as to who are the stockholders entitled to examine such books or list, and to vote at elections; and the board of directors shall produce at the time and place of such election such books or list, there to remain during the election, and the neglect or refusal of said directors to produce the same shall render them ineligible to any office at such election.

1901, c. 2, s. 38.

1054. Transfer book determines right to vote. In case the right to vote upon any share of stock shall be questioned, the stock books of the corporation shall be referred to, to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote.

1901, c. 2, s. 45.

1055. Directors, how elected; quorum for. All elections for directors shall be by ballot, unless otherwise expressly provided in the charter or certificate of incorporation or by-laws; the poll shall remain open one hour, unless all the stockholders are present in person or by proxy and have sooner voted, or unless all the stockholders waive this provision in writing; the persons receiving the greatest number of votes shall be the directors: Provided, however, that a majority of all the stock issued and outstanding shall be present in person or by proxy.

1901, c. 2, s. 39.

1056. Votes stockholders entitled to; cumulative voting. The certificate of incorporation, original or amended, of any corporation now or hereafter organized under the laws of this state, and thereunder issuing or authorized to issue shares of its capital stock, may provide that at all elections of directors, managers or trustees, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors, managers or trustees to be elected, and that he may cast all of such votes for a single director, manager or trustee, or may distribute them, among the number to be voted for, or any two or more of them, as he may see fit, which right, when exercised, shall be termed cumulative voting. This section shall not be construed as affecting in anywise the determination of whether or not the right of cumulative voting has been heretofore granted by implication, or the right of cumulative voting, if any, granted specifically by special charter, or certificate of incorporation.

1901, c. 2, s. 40.

1057. Votes stockholders entitled in absence of special provision; proxies; transfers within twenty days of election. Unless otherwise provided in the charter, certificate of incorporation or by-laws of the corporation, at every election each stockholder, whether resident or non-resident, shall be entitled to one vote in person or by proxy, duly authorized in writing, for each share of the capital stock held by him, but no proxy shall be voted on after three years from its date; nor shall any share of stock be voted on at any election which has been transferred on the books of the corporation within twenty days next preceding such election.

1901, c. 2, s. 41.

1058. Stock held by fiduciaries, pledgees and married women. Every person holding stock as executor, administrator, guardian or trustee, or in any other representative or fiduciary capacity, may represent the same at all meetings of the corporation, and may vote thereon as a stockholder, with the same effect as if the absolute owner thereof, unless the instrument creating the trust shall provide to the contrary. A married woman holding stock may vote the same, in person or by proxy, in the same manner and with the same effect as if she were a feme sole; and every person who shall pledge his stock as collateral security may, nevertheless, represent the same at all such meetings, and may vote thereon as a stockholder, unless in the transfer to the pledgee on the books of the corporation he shall have expressly empowered the pledgee to vote thereon, in which case only the pledgee or his proxy may represent said stock and vote thereon.

1901, c. 2, s. 42; 1901, c. 474.

1059. Stock held by life tenant. Where stock is owned by, or shall be transferred on its record books to, one for life with remainder over, such life tenant at all meetings of such corporation may represent and vote said stock in person or by proxy, in the same manner and with the same effect as if such life tenant was the absolute owner thereof.

1901, c. 474, s. 2.

1060. Shares belonging to corporation. Shares of stock of a corporation belonging to said corporation shall not be voted upon directly or indirectly.

1901, c. 2, s. 43.

1061. Failure to hold election, effect; judge may order. If the election for directors of a corporation shall not be held on the day designated by the act or certificate of incorporation or by-laws, the directors shall cause the election to be held as soon thereafter as conveniently may be. No failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation; and if the directors shall fail or refuse for thirty days after receiving a written request for such election from those owning one-tenth of the outstanding shares of stock, to call a meeting for such election, then the judge of the district, or the judge presiding in the courts of the district, in which the principal office of the corporation is located, may, upon the application of any stockholder, and on notice to the directors, order an election or make such other order as justice may require. The proceedings governing the issuance and hearing of injunctions shall, as far as applicable, govern such hearing.

1901, c. 2, s. 46.

1062. Jurisdiction of superior court over elections. The superior court judge, upon application of any person who may be aggrieved by, or complain of, any election, or any proceeding, act or matter in or touching the same, ten days' notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application, shall proceed forthwith, at chambers, in any county in the district in which the principal office of the corporation is situated, to hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matter or causes of complaint, and thereupon establish the election so complained of, or order a new election, or make such order, and give such relief in the premises as right and justice may require. The proceedings shall be the same as in injunctions, as nearly as may be.

1901, c. 2, s. 47.

1063. Meetings called by three stockholders, when. Whenever, for any reason, a legal meeting of the stockholders of any corporation can not be otherwise called, three or more stockholders, having voting powers, may call such meeting by publishing ten days' notice of the time, place and purposes of the meeting, in a newspaper published in the county in which the principal office in this state is located, and mailing such notice to all stockholders whose postoffice address is known, or can be ascertained. A meeting called as aforesaid, shall be a legal meeting of the corporation, and if there be no officers present, the stockholders may elect officers for the meeting; and the secretary of the meeting shall record the proceedings thereof in the book of minutes of the corporation.

1901, c. 2, s. 51.

IX. DIVIDENDS.

1064. When declared; working capital. The directors of every corporation created under this chapter shall, in January in each year, unless some specific day or days for that purpose be fixed in its charter, certificate of incorporation or by-laws, and in that case then on the days so fixed, after reserving, over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand: Provided, that the corporation may, in its certificate of incorporation, or in its by-laws, give the directors power to fix the amount to be reserved as a working capital.

1901, c. 2, s. 52.

1065. From profits and surplus only; liability of directors; limitations of actions. No corporation shall declare and pay dividends, except from the surplus or net profits arising from its business, nor when its debts, whether due or not, shall exceed two-thirds of its assets, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of its capital stock, or reduce its capital stock, except according to this chapter, and in case of any violation of the provisions of this section, the directors under whose administration the same may happen, shall be jointly and severally liable, at any time within six years after paying such dividend, to the corporation and to its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend so paid, or capital stock so divided, withdrawn, paid out or reduced, with interest on the same from the time such liability accrued: Provided, that any director who may have been absent when the same was done, or who may have dissented from the act or resolution by which the same was done, may exonerate himself from such liability by causing his dissent to be entered

at large on the minutes of the directors, at the time the same was done, or forthwith after he shall have notice of the same.

Code, s. 681; 1901, c. 2, ss. 33, 52.

X. FOREIGN CORPORATIONS.

1066. May do business here. Any corporation created by any other state, or by any foreign state, kingdom or government may acquire by devise or otherwise and hold, mortgage, lease and convey real estate in this state for the purpose of prosecuting its business, or objects, or such real estate as it may acquire by way of mortgage or otherwise in the payment of debts due such corporation: Provided, such foreign state, kingdom or government, under whose laws such corporations were created, shall not be at the time of such purchase, at war with the United States.

1901, c. 2, s. 93.

1067. To file charters and statement with secretary of state; fees therefor; forfeiture. Every foreign corporation before being permitted to do business in this state, railroad, banking, insurance, express and telegraph companies excepted, shall file in the office of the secretary of state a copy of its charter or articles of agreement, attested by its president and secretary, under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized, the amount actually issued, the principal office in this state, the name of the agent in charge of such office, the character of the business which it transacts and the names and postoffice addresses of its officers and directors. And such corporation shall pay to the secretary of state, for the use of the state, ten cents for every one thousand dollars of the total amount of the capital stock authorized to be issued by such corporation, but in no case less than ten dollars nor more than one hundred dollars. And every corporation failing to comply with the provisions of this section shall forfeit to the state five hundred dollars, to be recovered, with costs, in an action to be prosecuted by the attorney general, who shall prosecute such actions whenever it shall appear that this section has been violated.

1901, c. 2, s. 57; 1903, c. 766.

XI. DISSOLUTION.

1068. Voluntary. Whenever, in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board, at any meeting called for that purpose, of which meeting every director shall have received at least three days' notice, shall

cause notice of adoption of such resolution to be mailed to each stockholder residing in the United States, to his last known postoffice address, and also, beginning within said ten days, cause a like notice to be published in a newspaper published in the county wherein the corporation shall have its principal office, at least four weeks successively, once a week, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolutions so adopted by the board of directors, and which meeting may, on the day so appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at one time, of which adjourned meeting notice by advertisement in said newspaper shall be given; and if at any such meeting two-thirds in interest of all the stockholders shall consent that a dissolution shall take place, and signify their consent in writing, such consent, together with the list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed and the board of directors shall cause such certificate to be recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and published four weeks successively, at least once a week, in a newspaper published in said county; and upon filing in the office of the secretary of state of an affidavit of the manager or publisher of such newspaper that said certificate has been so published, the corporation shall be dissolved, and the board shall proceed to settle up and adjust its business and affairs. Whenever all the stockholders shall consent in writing to a dissolution, no meeting or notice thereof shall be necessary, but on filing said consent in the office of the secretary of state he shall forthwith issue a certificate of dissolution, which shall be published as above provided, and recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located.

1901, c. 2, s. 34.

1069. Involuntary, at instance of private persons. Corporations may be dissolved by civil action, instituted by the corporation, a stockholder, or creditor, or by authority of the attorney general in the name of the state, in the cases hereinafter mentioned, to-wit:

1. For any abuse of its powers to the injury of the public or of the stockholders, or of its creditors or debtors.
2. For nonuser of its powers for two years or more consecutively.
3. When it shall become insolvent, or shall suspend its ordinary

business for want of funds to carry on the same, or be in imminent danger of insolvency, or has forfeited its corporate rights.

4. Upon any conviction of the company of a criminal offense if such offense be persistent.

Code, s. 694; 1901, c. 2, s. 73.

Note. For obtaining leave of attorney general, see ss. 783, 784.

1070. Attorney general may sue to restrain ultra vires acts; to compel accounts; to remove officers; to preserve property. An action may be brought by the attorney general in the name of the state, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases: To restrain by injunction, any corporation from assuming or exercising any franchise, or transacting any business not allowed by its charter; to restrain any person from exercising corporate franchises not granted; to bring directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care; to remove such officers or trustees upon proof of gross misconduct; to secure, for the benefit of all interested, the property or funds aforesaid; to set aside and restrain improper alienations thereof, and generally to compel the faithful performance of duty, and prevent all malversations, peculations and waste.

Code, ss. 607, 686; 1901, c. 2, s. 107.

Note. For obtaining leave of attorney general, see ss. 783, 784.

1071. Involuntary, at instance of attorney general. An action may be brought by the attorney general in the name of the state against a corporation for the purpose of vacating or annulling the act or certificate, or renewal of the same, creating the corporation, on the ground that such act or certificate or renewal was procured upon some fraudulent suggestion, or concealment of a material fact, by the persons incorporated, or by some of them or with their knowledge and consent, or annulling the existence of a corporation, other than municipal, whenever such corporation shall—

1. Offend against the act creating, altering, or renewing such corporation; or,

2. Violate any law by which such corporation shall have forfeited its charter by abuse of its powers; or,

3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its power; or,

4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or,

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law; or,

6. For nonuser of its powers for two or more years consecutively; or,

7. For insolvency, manifested by the return of an execution unsatisfied, upon a judgment against the company docketed in the superior court of the county where it has its principal place of business.

And it shall be the duty of the attorney general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to bring the action, in every case of public interest, and also in every other case in which satisfactory security shall be given to indemnify the state against the costs and expenses to be incurred thereby.

Code, ss. 604, 605; 1889, c. 533.

1072. Service of summons in actions for. In any action for the dissolution of a corporation, or for the appointment of a receiver thereof, the summons must be served on the corporation by service on an officer thereof, or on the process agent of the corporation, and shall be served on the stockholders, creditors, dealers and others interested in the affairs of the company, by publishing a copy thereof at least weekly for not less than three successive weeks in some newspaper printed in the county in which such corporation has its principal place of business, or if there be no such newspaper published, then by posting a copy of such summons at the door of the courthouse of such county, and publishing a copy thereof for the time and in the manner aforesaid in the newspaper published nearest the county seat of the county in which such corporation has its principal place of business, or in some newspaper published in the city of Raleigh; and such publication shall be deemed and held sufficient service on all the stockholders, creditors of, or dealers with, such corporation, and upon the corporation, if no officer can after due diligence be found in the state and it shall have no process agent in the state; and all such stockholders, creditors or dealers or other parties interested may intervene in said proceedings and become parties thereto for themselves, or for others in like interest, under such rules as the court for the purpose of justice shall prescribe.

Code, s. 695.

1073. Corporate existence continued three years for winding up. All corporations whose charters shall expire by their own limitation, or shall be annulled by forfeiture or otherwise, shall nevertheless be continued bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital; but not for the purpose of continuing the business for which such corporation may have been established.

Code, s. 667; 1901, c. 2, s. 58.

1074. Upon dissolution, directors to be trustees; powers and duties; debts not extinguished. Upon the dissolution in any manner of any corporation, unless otherwise directed by an order of the court, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them. They shall have power to meet, and act under the by-laws of the corporation, and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all, or any part for cash, or partly on credit, or take mortgages or bonds for part of the purchase price for all or any part of said property. In case of the dissolution of a corporation, the debts due to and from it shall not be thereby extinguished.

Code, s. 687; 1901, c. 2, s. 59.

1075. Directors as trustees may sue and be sued. The directors, constituted trustees as aforesaid, shall have power to sue for and recover the aforesaid debts and property, in the name of the corporation, and shall be suable by the same name for the debts owing by such corporation, and shall be jointly and severally responsible for such debts, only to the amount of moneys and property of the corporation which shall come to their hands or possession as such trustees,

1901, c. 2, s. 60.

1076. Jurisdiction of superior court; may appoint directors or others as receivers; powers and duties. Whenever any corporation shall be dissolved in any manner whatsoever, the superior court, on application of any creditor, or stockholder, at any time, may either continue the directors trustees as aforesaid, or appoint one or more persons to be receivers of such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all suits necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of its unfinished business; and the powers of such trustees or receivers may be continued as long as the court shall think necessary for such purposes.

Code, ss. 619, 668; 1901, c. 2, s. 61.

1077. Jurisdiction of judge. The judge of the superior court shall have jurisdiction of such application and of all questions arising in the proceedings thereon, and make such orders, injunctions, and

decrees therein as justice and equity shall require at any place in the district.

Code, s. 669; 1901, c. 2, s. 62.

1078. Injunction; when notice and undertaking required. An injunction to suspend the general and ordinary business of a corporation or to appoint a receiver shall not be granted without due notice of the application therefor to the proper officers of the corporation, except where the state is a party to the proceeding, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, or the appointment of the receiver, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

Code, s. 343; C. C. P., s. 194.

1079. Wages for two months lien on assets. In case of the insolvency of any corporation the laborers and workmen and all persons doing labor or service of whatever character in the regular employment of such corporation, shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for all labor, work, and services done, performed or rendered within two months next preceeding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation, which lien shall be prior to all other liens that can or may be acquired upon or against such assets.

1901, c. 2, s. 87.

1080. Distribution of funds. After payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, and the creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest, when interest is not accruing on the same, and the surplus funds, if any, after payment of the creditors and the costs, expenses and allowances aforesaid, and the preferred stockholders, according to their respective shares, and if there still be a surplus it shall be divided and paid to the general stockholders proportionately, according to their respective shares. Upon the distribution of the assets of an insolvent corporation, judgment of dissolution shall be entered.

Code, s. 670; 1901, c. 2, ss. 63, 89.

1081. Dissolution does not abate actions; receivers to be notified. Any action now pending, or to be hereafter begun, against any corporation which may become dissolved before final judgment, shall not abate by reason thereof, but no judgment shall be entered therein, except upon notice to the trustees or receivers of the corporation.

1901, c. 2, s. 64.

1082. Judgment of forfeiture against a corporation. If it shall be adjudged that a corporation against which an action shall have been brought, has forfeited by neglect, abuse, or surrender, its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

Code, s. 617.

1083. Persons claiming to be corporation liable for costs of action. If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs therein to be collected by execution against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

Code, s. 618.

1084. Clerk superior court to file copy of judgment dissolving corporation with secretary of state; costs thereof. A copy of every judgment dissolving a corporation or forfeiting its charter shall be forthwith filed by the clerk of the court, in the office of the secretary of state, and a note thereof shall be made by the secretary of state, on the charter or certificate of incorporation, and in the index thereof, and be published by him in the annual report hereinafter provided for, the cost of which shall be taxed by the clerk of the superior court, in the action wherein the corporation is dissolved.

1901, c. 2, s. 65.

XII. EXECUTION.

1085. How issued and on what levied. If any judgment shall be rendered against a corporation, the plaintiff may sue out such executions against the property of a corporation as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation.

1901, c. 2, s. 66.

1086. Agent must furnish information as to property to officer with. Every agent or person having charge or control of any property of a corporation, on request of any public officer, having for service

a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due to it, so far as he may have knowledge of the same.

1901, c. 2, s. 67.

1087. Shares of stock sold under. Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this state, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution, in the same manner as goods and chattels.

1901, c. 2, s. 69.

1088. Officer entitled to information as to stock. The clerk, cashier, or other officer of such company, who has at the time the custody of the books of the company, shall, upon exhibiting to him the writ of execution, give to the officer having such writ a certificate of the number of shares or amount of the interest held by the defendant in such company; and if he shall neglect or refuse so to do, or if he shall wilfully give a false certificate thereof, he shall be liable to the plaintiff for the amount due on said execution, with costs.

1901, c. 2, s. 70.

1089. Against debts due corporation; liability of agents refusing compliance. If any officer holding an execution shall be unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part, out of any debts due to the corporation; and it shall be the duty of any agent or person having custody of any evidence of such debt, to deliver the same to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor shall be a valid assignment thereof; and such creditor may sue for and collect the same in the name of the corporation, subject to such equitable setoffs on the part of the debtor as in other assignments: and every agent or person who shall neglect or refuse to comply with the provisions of this and the last preceding section, shall be himself liable to pay to the execution creditor the amount due on said execution, with costs.

1901, c. 2, s. 68.

1090. Proceedings when custodian of corporate books is a nonresident. When the clerk, cashier, or other officer of any corporation incorporated under the laws of this state, who has the custody of the books of registry of the stock thereof, shall be nonresident in this state, it shall be the duty of the sheriff receiving a writ of execu-

tion issued out of any court of this state against the goods and chattels of a defendant in execution holding stock in such company, to send by mail a notice in writing, directed to such nonresident clerk, cashier, or other officer, at the postoffice nearest his reputed place of residence, stating in such notice that he, the said sheriff, holds such writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels such writ has been issued, and that by virtue of such writ he, the sheriff, seizes and levies upon all the shares of stock of such company held by the defendant in execution on the day of the date of such written notice; and it shall also be the duty of such sheriff on the day of mailing such notice, to affix and set up upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of said company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode; and the sending, setting up and serving of such notices in the manner aforesaid, shall constitute such levy taken to be a valid levy of such writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of such notice by said clerk, cashier, or other officer, who has custody of the books of registry of the stocks thereof, been actually transferred by the defendant; and thereafter any transfer or sale of such shares by the defendant in execution shall be void as against the plaintiff in said execution, or any purchaser of such stock at any sale thereunder.

1901, c. 2, s. 71.

1091. Duty and liability of nonresident custodian of corporate books. The nonresident clerk, cashier, or other officer in such company, to whom notice in writing is sent, as prescribed in the preceding section, shall thereupon send forthwith, by mail or otherwise, to the officer having such writ, a statement of the time when he received such notice and a certificate of the number of shares held by the defendant in such company at the time of the receipt by him of such notice, not actually transferred on the books of said company; and the said sheriff, or other officer, shall, on receipt by him of such certificate, insert the number of such shares in the inventory attached to said writ; and if such clerk, cashier, or other officer in such company, neglect to send such certificate as aforesaid, or if he shall wilfully send a false certificate, he shall be liable to the plaintiff for double the amount of all damages occasioned by such neglect, or false certificate, to be recovered in an action against him; but the neglect to send, or mis carriage of such certificate, shall not impair the validity of the levy upon the stock.

1901, c. 2, s. 72.

XIII. RECEIVERS.

1092. When appointed. Whenever any corporation shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, or be in imminent danger of insolvency, or has forfeited its corporate rights, or its corporate existence shall have expired by limitation, a receiver may be appointed by the court under the same regulations as are provided by law for the appointment of receivers in other cases.

Code, s. 668; 1901, c. 2, s. 73.

Note. See also s. 1076.

1093. Debts provided for, receiver discharged. Whenever a receiver shall have been appointed, and it shall afterwards appear that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that its property, rights, franchises and effects shall revert to the corporation, and thereafter the corporation may resume control of, and enjoy the same, as fully as if the receiver had never been appointed.

1901, c. 2, s. 76.

1094. Reorganization after receiver discharged. Whenever a majority in interest of the stockholders of such corporation shall have agreed upon a plan for the reorganization of the corporation and a resumption by it of the management and control of its property and business, such corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for such amount as may be necessary for the purposes of such reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization.

1901, c. 2, s. 77.

1095. Powers and bond. Such receiver shall have full power and authority to demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation, foreclose mortgages, deeds of trust and other liens executed to the corporation, and to institute suits for the recovery of any estate, property, damages or demands existing in favor of the corporation, and to appoint agents under him, and to do all other acts which might

be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation; and the powers of such receiver may be continued as long as the court shall think necessary for the purposes aforesaid, and the receiver shall have power to sell, convey and assign all the said estate, rights and interest, and shall hold and dispose of the proceeds thereof under the direction of the court. The word receiver as used in this chapter shall be construed to include receivers and trustees appointed, as provided in this chapter. Every receiver shall, before acting, enter into such bond and comply with such terms as the court may prescribe.

Code, s. 668; 1901, c. 2, s. 74.

1096. Majority may act; removal of; vacancies. Every matter and thing required to be done by receivers or trustees shall be good and effectual, to all intents and purposes, if performed by a majority of them; and the court may remove any receiver or trustee and appoint another in his place, or fill any vacancy which may occur.

1901, c. 2, s. 79.

1097. Property to vest in. All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.

1901, c. 2, s. 75.

1098. Inventory. Such receiver, within thirty days after his appointment, shall lay before the court a full and complete inventory of all estate, property and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and make a report to the superior court of his proceedings, at every civil term thereof during the continuance of the trust.

1901, c. 2, s. 80.

1099. Compensation. Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent. upon receipts and disbursements, and the costs and expenses of administration of his trust, and the costs of the proceedings in said court to be first paid out of said assets.

1901, c. 2, s. 88.

1100. May send for persons and papers; penalty for refusing to answer. Such receiver shall have power to send for persons and papers, and to examine any persons, including the creditors and

claimants, and the president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, and choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts and liabilities, and the claims against it; and if any person shall refuse to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuse to declare the whole truth touching the subject matter of the said examination, the court may, on report of the receiver, commit such person as for contempt.

1901, c. 2, s. 78.

1101. Time limit for creditors to present claims. The court may limit the time within which creditors shall present and make proof to such receiver of their respective claims against the corporation, and may bar all creditors and claimants failing so to do within the time limited, from participating in the distribution of the assets of the corporation; the court may also prescribe what notice, by publication or otherwise, shall be given to creditors of such limitation of time.

1901, c. 2, s. 81.

1102. Claims, how presented and proved; power and duty of receiver. Every claim against an insolvent corporation shall be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver shall direct, and shall produce such books and papers relating to the claim as shall be required; and the receiver shall have power to examine, under oath or affirmation, all witnesses produced before him touching the claims, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination.

1901, c. 2, s. 82.

1103. Claims reported to court; exceptions in ten days; right to jury trial. It shall be the duty of such receiver to report to the term of the superior court subsequent to any finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of such finding by the receiver, and not later than within the first three days of the said term; and if, on any exception so filed, a jury trial shall be demanded, it shall be the duty of the court to prepare a proper issue and submit the same to a jury; and if such demand is not made in the exceptions to the report the right to a jury trial

shall be deemed to have been waived. The judge may, in his discretion, extend the time for filing such exceptions.

1901, c. 2, s. 83.

1104. May become plaintiff in pending actions. Such receiver shall, upon application by him, be substituted as party plaintiff or complainant in the place and stead of the corporation, in any suit or proceeding which was pending at the time of his appointment.

1901, c. 2, s. 84.

1105. Property sold pending litigation; fund reserved. When the property of an insolvent corporation is at the time of the appointment of a receiver incumbered with mortgages or other liens, the legality of which is brought in question and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of incumbrances, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court shall direct.

1901, c. 2, s. 86.

NOTE. For service of process, actions for appointment of receivers, see s. 1072.

XIV. TAXES AND FEES.

1106. State taxes; organization, amendments, dissolution, etc.

On filing any certificate or other paper, relative to corporations, in the office of the secretary of state, the following taxes shall be paid to the state treasurer, for the use of the state: For certificates of incorporation twenty cents for each thousand dollars of the total amount of capital stock authorized, but in no case less than twenty-five dollars; increase of capital stock, twenty cents for each thousand dollars of the total increase authorized, but in no case less than twenty dollars; extension or renewal of corporate existence of any corporation, the same as required for the original certificate of organization by this chapter; change of name, change of nature of business, amended certificate of incorporation (other than those authorizing increase of capital stock), decrease of capital stock, increase or decrease of par value of, or number of, shares twenty dollars; for filing list of officers and directors, one dollar; dissolution of corporation, change of principal place of business, five dollars: Provided, that no taxes shall be required to be paid by any benevolent, religious, educational, or charitable society or association having no capital stock; and these taxes shall not be cumulative, but when two or more taxes would have been incurred, the tax for all shall be the largest single tax.

1901, c. 2, s. 96.

1107. Fees to secretary of state and clerk of superior court.

The secretary of state shall collect and retain the following fees, viz: For recording the certificate of incorporation one dollar for the first three copy sheets and ten cents for each copy sheet in excess thereof, and for official seal fifty cents; for copying the same fees as for recording. There shall be paid the clerk of the superior court for recording the certificate of incorporation a fee of three dollars.

Code, s. 680; 1893, c. 318, s. 4; 1901, c. 2, s. 96.

1108. Tax on bills creating private corporations; copy to be filed with secretary of state before organization. Every bill introduced in either house of the general assembly to incorporate any private corporation, or to amend the charter of such corporation, shall be accompanied by a receipt from the state treasurer, showing that there has been paid an organization tax in double the amount prescribed for corporations organized under this chapter, and in addition thereto each private corporation (railroad, insurance and banking companies excepted) shall, before its organization, file and have recorded a copy of the bill creating it in the office of the secretary of state, and shall become subject to the provisions of this chapter.

1901, c. 2, s. 97; 1903, c. 93.

1109. Corporate property liable for taxes, though in receiver's hands. Whenever taxes are duly assessed, charged and extended against any corporation having chartered rights, or doing business in this state, or having property in this state, or against any person resident in this state or doing business, or having property in this state, and the tax list is in the hands of any officer or tax collector, it shall be competent for such officer or tax collector, whenever said taxes, whether listed or unlisted, are due and unpaid, to levy upon, seize and take into his possession such part of the property belonging to such person or corporation as may be necessary to pay such taxes listed or unlisted, whether the property of such corporation or person be in the hands of a receiver duly appointed or not.

Code, s. 699.

1110. Tax collector need not obtain order of court though property is in receiver's hands. In all cases provided for in the preceding section, it shall not be necessary for such officer or tax collector to apply and obtain from the court appointing such receiver, or having jurisdiction of the property or of the receiver, an order for the payment of such taxes, but the same may be collected as aforesaid, by distraint and seizure, as if the property or corporation was not in the hands of a receiver. This section and the preceding section shall apply to all taxes, whether state, county, town, or municipi-

pal; and shall be liberally construed in favor of, and in furtherance of, the collection of said taxes.

Code, s. 700.

XV. REORGANIZATION.

1111. Corporations whose property and franchises sold under order of court or execution. Whenever the property and franchises of a corporation shall be sold under a judgment or decree of a court of this state, or of the circuit court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale shall vest in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was made, to said property and franchises so sold, subject to all the conditions, limitations and restrictions of said corporation; and such purchaser and his associates, not less than three in number, shall thereupon become a new corporation, by such name as said persons shall select, who shall be the stockholders in the ratio of the purchase money by them respectively contributed; and shall be entitled to all the rights and franchises and be subject to all the conditions, limitations and penalties of the said corporation whose property and franchises shall have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of such sale shall succeed to all the franchises, rights and privileges of said original corporation only when such sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when said railroad is sold as an entirety.

Code, ss. 697, 698; 1897, c. 305; 1901, c. 2, s. 99.

1112. New corporators to meet and organize. The persons for, or on whose account, any such property and franchises may have been purchased, shall meet within thirty days after the conveyance made by virtue of said process, or decree, shall have been delivered, written notice of the time and place of said meeting having been given to each of said several persons at least ten days before said meeting, and organize said new corporation.

1901, c. 2, s. 100.

1113. Duties and powers at meeting. At such meeting the said persons shall adopt a corporate name and corporate seal, determine the amount of the capital stock of said corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they shall see fit. The said corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary.

1901, c. 2, ss. 101, 102.

1114. Certificate to be filed with secretary of state. It shall be the duty of such new corporation, within one month after its organization, to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of such organization, the name so adopted, the amount of capital stock, and the name of its president and directors, and transmit the said certificate to the secretary of state, to be filed and recorded in his office, and there remain of record; and a certified copy of such certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the said corporation, and shall be the charter and evidence of the corporate existence of said new corporation: Provided, that nothing contained in this chapter shall divest, or in any manner impair, the lien of any prior mortgage, or other incumbrance upon the property or franchises, conveyed under the sale of said property or franchise, when by the terms of the process or decree under which the sale was made, or by operation of law, the said sale is made subject to the lien of any such prior mortgage or other encumbrance: And provided, that no such sale and conveyance or organization of such new corporation shall in anywise affect or impair any rights of any person, body politic or corporate, not a party to the action in which the aforesaid decree was made, nor of the said party, except so far as determined by said decree: And provided, also, that when any trustee shall be made a party to such action and his cestui que trust, for any reason satisfactory to the court in which the action may be, shall not be made a party thereto, the rights and interest of such cestui que trust shall be concluded by such decree.

1901, c. 2, s. 103.

XVI. MISCELLANEOUS PROVISIONS.

1115. Name of corporation to be displayed. The name of every corporation shall be at all times conspicuously displayed at the entrance of its principal office in this state, and in default thereof for sixty days the corporation shall be liable to a penalty of one hundred dollars, to be recovered with costs, by the state, in an action to be prosecuted by or under the direction of the attorney general.

1901, c. 2, s. 50.

1116. Resident process agent required; in absence, service upon secretary of state sufficient; fees. Every corporation having property or doing business in this state, whether incorporated under its laws or not, shall have an officer or agent in this state, upon whom process in all actions or proceedings against it can be served; and any corporation failing to comply with the provisions of this section shall be liable to a forfeiture of its charter, or to the revocation of

its license to do business in this state. In any such case, process in any action or proceeding against such corporation, may be served upon the secretary of state by leaving a true copy thereof with him, and he shall mail the said copy to the president, secretary or other officer of the corporation, upon whom, if residing in this state, service could be made; and for the service to be performed by the said secretary, he shall receive a fee of fifty cents, to be paid by the party at whose instance the service is made.

1901, c. 5.

1117. Secretary of state to annually publish list of corporations created. The secretary of state shall annually compile from the records of his office, and publish a complete list, in alphabetical order, of existing domestic corporations and of the original and amended certificates of incorporation filed during the preceding year, together with the location of the principal office of each in this state, the name of the agent in charge thereof, the amount of authorized capital stock, the amount with which business is to be commenced, the amount issued, the date of filing the certificate, and the period for which the corporation is to continue.

1901, c. 2, s. 104.

1118. Mutual corporations may create stock. The members of any mutual corporation may provide for and create a capital stock of such corporation, upon the consent in writing of all the members of the corporation, and may provide for the payment of such stock, and fix and prescribe the rights and privileges of the stockholders therein not inconsistent with law.

1901, c. 2, s. 105.

1119. Forfeiture by failure for two years to organize; or after organization, to act; duty of secretary of state and attorney general. When any act shall have been passed, or certificate of incorporation, as provided in this chapter, shall have been recorded, creating a body corporate, and the incorporators for two years shall neglect or fail to organize the company and carry into effect the intent of the act, or when organized, if they at any time for two years together shall cease to act, then such disuse of their corporate privileges and powers shall be deemed and taken as a forfeiture of the charter. And if, after thirty days' notice by the secretary of state, such corporation shall fail to surrender its corporate rights, or to dissolve, in the manner provided in this chapter, the secretary of state shall report such corporation to the attorney general, who shall institute an appropriate action for the dissolution of such corporation.

Code, s. 688; 1901, c. 2, s. 106.

1120. Meaning of "judge," "court," etc. Whenever the words "court," "superior court," or "judge of the superior court" appear in this chapter, they shall be construed to mean the judge of the superior court resident of the district or holding the courts by rotation, exchange, or appointment, of the district wherein such corporation may have its principal place of business.

1901, c. 2, s. 111.

NOTE. Corporate bonds may be sold for less than par, see s. 1931.

CHAPTER 20.

CORPORATION COMMISSION.

| | Sections. |
|-----------------------|-----------|
| I. Court, | 1121—1130 |
| II. Investigations, | 1131—1132 |
| III. Powers, | 1133—1140 |
| IV. Appeals, | 1141—1147 |
| V. Injunction, | 1148—1151 |
| VI. Penalties, | 1152—1159 |
| VII. Jurisdiction, | 1160—1169 |
| VIII. Rates, | 1170—1178 |
| IX. Duties, | 1179—1184 |
| X. Tax commissioners, | 1185—1197 |

I. COURT.

1121. Court of record. There shall be a court of record, known as the "corporation commission"; such court shall adopt a seal, and shall have all of the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in this chapter. The members and clerk thereof may administer oaths.

1899, c. 164, ss. 1, 31.

1122. Number of commissioners. The court shall consist of three commissioners, who shall be elected by the qualified voters of the state, in the same manner as other state officers are elected. The court shall organize by the election of one of the commissioners as chairman.

1899, c. 164, s. 1.

1123. Term of office. The term of office of the commissioners shall begin on the first day of January next after their election, and

shall continue for six years and until their successors are elected and qualified. One member of the court shall be elected at each general election.

1899, c. 164.

1124. Vacancy. If for any cause there shall be a vacancy in the commission, the governor shall appoint to such vacancy; such appointee shall hold until the election and qualification of his successor, who shall be elected at the next general election, after the vacancy occurred; the person so elected shall hold office for the unexpired term.

1899, c. 164; 1901, c. 194.

1125. Qualification of commissioners. It shall be unlawful for any member or official of said court to jointly, severally or in any other way, either directly or indirectly, hold any stock or bond, or be the agent, attorney or employee, or have any interest in any way, in any steamboat, railroad, canal, navigation, express, telegraph, telephone, bank or building and loan company, or association. If any member or official of said court shall, during the term of his office as distributee or legatee, or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same, and upon failure to do so shall forfeit his office, and may be suspended by the governor.

1899, c. 164.

1126. Oath of office. The members of the court in addition to the oath to support the constitution and laws of the United States and the constitution and laws of the state of North Carolina shall take, to be administered by one of the judges of the supreme court, the following oath of office, which oath shall be signed by such commissioners and attested by said judge and recorded in the office of the secretary of state: "I do solemnly swear (or affirm) that I am not the owner of any steamboat or of any stock or bond of any railroad, navigation or canal company, express, telegraph or telephone company, or of any bank or building and loan association, or the agent or attorney or employee of any such company or association; that I have no interest in any way in any such company or association, and that I will well and faithfully execute the duties of my office as a member of the corporation commission and as state tax commissioner to the best of my knowledge and ability, without fear, favor, malice, reward or the hope of reward. So help me, God."

1899, c. 164, s. 1; 1903, c. 251, s. 3.

1127. Place of meeting. The court shall be held in the city of Raleigh. Special sessions may be held at any place, in the state,

when in the judgment of the court the convenience of all parties is best subserved and expense is thereby saved.

1899, c. 164, ss. 30, 31; 1901, c. 679, s. 4.

1128. Open at all times. The court shall be open at all times for the transaction of business, and each member shall devote his whole time to the discharge of the duties of his office; and it shall be his duty to remain in said office at least fifteen days in each month.

1899, c. 164, s. 30; 1903, c. 251, s. 3.

1129. Quorum. Any two members of the court shall constitute a quorum for the transaction of business. The chairman is hereby authorized and empowered to perform the duties and exercise the powers conferred by law upon the corporation commission as to or over banks and building and loan associations, but this shall not prevent, as to banking and building and loan associations, the other members of the court from acting with the chairman in all of such matters.

1899, c. 164, s. 29.

1130. Clerk. The court shall appoint a clerk, who shall be an expert accountant, experienced in railroad statistics and transportation rates. His term of office shall be for two years. He shall take and subscribe to oaths of office similar to those prescribed for the commissioners.

1899, c. 164, ss. 9, 31.

II. INVESTIGATIONS.

1131. Examinations. The commissioners shall from time to time, visit the places of business, and investigate the books and papers of all corporations, firms or individuals engaged in the transportation of freight or passengers, the transmission of messages either by telegraph or telephone, all public or private banks, loan and trust companies, and all building and loan associations, to ascertain if all the orders, rules and regulations of the corporation commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such companies, individuals, firms or corporations, and all other persons under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this chapter, and the chapters entitled "Banks" and "Building and Loan Associations."

1899, c. 164, s. 1.

1132. Railroad accidents. The commission may investigate the causes of any accident on a railroad or steamboat which they may deem to require investigation.

1899, c. 164, s. 24.

III. POWERS.

1133. General powers. The corporation commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies.

1899, c. 164, s. 1; 1901, c. 679.

1134. Witnesses; production of papers; contempt. The corporation commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts.

1899, c. 164, ss. 1, 9, 10.

1135. Rules of practice. The corporation commission shall prescribe rules of practice and procedure in all matters before it and in all examinations necessary to be made under this chapter.

1899, c. 164, s. 2, subsec. 24.

1136. Rules of evidence. In all cases under the provisions of this chapter the rules of evidence shall be the same as in civil actions, except as provided by this chapter.

1899, c. 164, s. 26.

1137. Subpœnas, how issued; served. All subpœnas for witnesses to appear before the commission or before any one or more of the commissioners, and notice to persons or corporations shall be issued by one of the commissioners or its clerk and be directed to any sheriff, constable or to the marshal of any city or town who shall execute the same and make due return thereof as directed therein under the penalties prescribed by law for a failure to execute and return the process of any court.

1899, c. 164, s. 10.

1138. Service of orders. The clerk of the commission may serve any notice issued by it and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and other officers to serve any process, subpœnas and notices issued by the commission-

ers, and they shall be entitled therefor to the same fees as are prescribed by law for serving similar papers issuing from the superior court.

1899, c. 164, s. 9.

1139. Undertakings. All bonds or undertakings required to be given by any of the provisions of this chapter shall be payable to the state of North Carolina, and may be sued on as are other undertakings which are payable to the state.

1899, c. 164, s. 7.

1140. Controversies may be submitted to commission. Whenever any company or corporation embraced in this chapter has a controversy with another corporation or person and all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators, the commission shall act as such, and after due notice to all parties interested shall proceed to hear the same, and their award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county in which said land is situated and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall be a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrators.

1899, c. 164, s. 25.

IV. APPEALS.

1141. Right of. From all decisions or determinations made by the corporation commission, any party affected thereby shall be entitled to an appeal therefrom. When an exception is made to the facts as found by the commission the appeal shall be to the superior court in term time; otherwise to the judge of the superior court at chambers. An appeal may be taken from the superior court to the supreme court as in other cases.

1899, c. 164, ss. 7, 28; 1903, c. 126, s. 1.

1142. How taken. Any person aggrieved by any order or decision of the court may, within ten days after notice of such decision, appeal therefrom to the superior court. The party desiring to appeal shall, within said ten days, cause to be served on the commission or its clerk a notice of such appeal, and shall within ten days thereafter file with the commission a statement of the errors assigned, and grounds of appeal. Upon the filing of such statement the commission shall, within ten days transmit all the papers and evidence considered by it, together with the assignment of errors filed by the appellant, to a judge of the superior court, holding court or residing

in some district in which such company operates or the party resides. If there be no exceptions to any facts as found by the commission, it shall be heard by the judge at chambers, at some place in the district of which all parties shall have ten days' notice.

1899, c. 164, s. 7.

1143. Appeal docketed; priority of trial; burden. The cause shall be entitled "State of North Carolina on relation of the Corporation Commission against such company," and if there are exceptions to any facts found by the commission, it shall be placed on the civil issue docket of such court and shall have precedence of other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of other civil causes, except that the rates fixed by the commission shall be *prima facie* just and fair.

1899, c. 164, s. 7.

Note. See s. 1178.

1144. Heard at chambers by consent. By consent of all parties the appeal may be heard and determined at chambers before any judge of a district through or into which the railroad may extend, or any judge holding court therein, or in which the person or company does business.

1899, c. 164, s. 7.

1145. To supreme court. Either party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that the state of North Carolina if it shall appeal shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and such court may advance the cause on its docket so as to give the same a speedy hearing.

1899, c. 164, s. 7.

1146. Rates vacated pending appeal, how. The rates of freight and fare fixed by the commission shall be and remain the established rates and shall be so observed and regarded by corporations appealing until the same shall be changed, reversed or modified by the judgment of the superior court, unless the railroad company shall within fifteen days file with said commission a justified undertaking, in a sum to be fixed by the commission, conditioned to pay the state of North Carolina the difference between the aggregate freights charged or received and those fixed by said commission, and to make a report of freights charged or received every three months during the pendency of such appeal; and whenever such difference in freights equals or exceeds the penalty of such undertaking the commission may require another to be executed and filed with them. From the time the undertaking first mentioned is filed the judgment

appealed from shall be vacated; but a failure for ten days to file any additional undertaking required by the commission shall eo instanti revive such judgment. Out of the funds paid into the state treasury under this section there shall be refunded to shippers the overpaid freight ascertained by the final determination of the appeal on the recommendation of the commission, if application therefor is made within one year from such final determination.

1899, c. 164, s. 7.

1147. Judgment superior court not vacated by appeal. Any freight or passenger rates fixed by the commission, when approved or confirmed by the judgment of the superior court, shall be and remain the established rates and shall be so observed and regarded by an appealing corporation until the same shall be changed, revised or modified by the final judgment of the supreme court, if there shall be an appeal thereto, and until changed by the corporation commission.

1899, c. 164, s. 7.

V. INJUNCTION.

1148. When granted; bond. No judge shall grant an injunction, restraining order or other process staying or affecting, during the pending of any appeal, the enforcement of any determination of the corporation commission fixing rates or fares, without requiring as a condition precedent the executing and filing with the corporation commission of a justified undertaking in the sum of not less than twenty-five thousand dollars for any company whose road is of less length than fifty miles, and fifty thousand dollars for any company whose road is over fifty miles in length, conditioned that the company will make and file with the corporation commission a sworn statement every three months during the pending of the appeal of the items of freight, with names of shippers, carried over such company's road within the preceding ninety days, showing the freight charged and those fixed by the corporation commission; and in the event the determination of the corporation commission appealed from is affirmed in part or in whole such company shall within thirty days pay into the treasury of North Carolina the aggregate difference between the freights collected and those fixed by the final determination of the matter appealed.

1899, c. 164, s. 7.

1149. Restraining order vacated, when. Whenever the aggregate difference between the freights collected and those fixed by the corporation commission shall equal or exceed the sum specified in the undertaking, the corporation commission shall notify the appellant that another justified undertaking in like sum and with

the same conditions as the original undertaking is required to be executed and filed with the corporation commission. A failure to file with the corporation commission the sworn statement provided for in the preceding section, or any one of them when more than one is required or asked for, or a failure to give an additional undertaking when required within fifteen days from notice so to do, shall vacate and render null and void any restraining order, injunction or other process to stay the enforcement of any determination of the corporation commission as to schedules of rates.

1899, c. 164, s. 7.

1150. Suits on injunction bond. When any of the conditions of such undertaking are broken it may be sued on and enforced in the name of the state of North Carolina on the relation of the corporation commission by summons returnable to the superior court of any county in the state at a regular term thereof. The solicitor of the district shall prosecute the action in his court on behalf of the state, and shall be allowed such fees, to be taxed in the bill of costs, as the court may order; and the attorney-general shall prosecute on appeal to the supreme court on behalf of the state and shall be allowed such fees, to be taxed in the bill of costs, as the court shall allow.

1899, c. 164, s. 7.

1151. What recovered; application of recovery. In cases where the sworn statements herein required to be made are not made the whole penalty of the undertaking shall be enforced and paid into the state treasury. The sums paid into the treasury under the provisions of this section shall be used to reimburse the shippers of freights for the excess of freights paid over what should have been paid, such reimbursements to be made on recommendation of the corporation commission: Provided, application therefor is made within one year after the determination of the appeal in which the undertaking was given. The recovery in each undertaking shall be applied to such excess of freights as has been paid during the period covered by such undertaking.

1899, c. 164, s. 7.

VI. PENALTIES.

1152. For violating rules. If any railroad company doing business in this state by its agents or employees shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officers thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or if not then to any local agent thereof, ample and full

recompense for the wrong or injury done thereby to any person or corporation as may be directed by the commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars.

1899, c. 164, s. 15.

1153. Refusing to obey orders of commission. Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the corporation commission shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake county, in the name of the state of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the corporation commission shall be a separate offense.

1899, c. 164, s. 23.

1154. Discrimination between connecting lines. All common carriers subject to the provisions of this chapter shall according to their powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freights to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges against such connecting lines, and connecting lines shall be required to make as close connection as practicable for the convenience of the traveling public. And common carriers shall obey all rules and regulations made by the commission relating to trackage.

1899, c. 164, s. 21.

1155. Failure to make reports. Every officer, agent or employee of any railroad company, express or telegraph company who shall wilfully neglect or refuse to make and furnish any report required by the commission for the purposes of this chapter, or who shall wilfully or unlawfully hinder, delay or obstruct the commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report shall raise the presumption that the same was wilful.

1899, c. 164, s. 18.

1156. General offenses. If any railroad company shall violate the provisions of this chapter not otherwise provided for, such railroad company shall incur a penalty of one hundred dollars for each violation, to be recovered by the party injured.

1899, c. 164, s. 17.

1157. Violation of rules, causing injury; damages; limitation. If any railroad company doing business in this state shall, in violation of any rule or regulation provided by the commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of wilful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury.

1899, c. 164, s. 16.

1158. Action for, when and how brought. An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the corporation commission against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the corporation commission upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the attorney general or the solicitor of the judicial district in which such penalty has been incurred, and the judge before whom the same is tried shall determine the amount of compensation to be allowed the attorney general or such solicitor prosecuting said action for his services, and such compensation so determined shall be taxed as part of the cost. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions.

1899, c. 164, s. 15.

1159. Remedies cumulative. The remedies given by this chapter to persons injured shall be regarded as cumulative to the remedies now given or which may be given by law against railroad corporations, and this chapter shall not be construed as repealing any statute giving such remedies.

1899, c. 164, s. 26.

VII. JURISDICTION.

1160. Delivering freight, express and baggage. The corporation commission shall make reasonable and just rules—

1. For the handling of freight and baggage at stations.
2. As to charges by any company or corporation engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations.

1899, c. 164, s. 2, subsecs. 2, 7.

1161. Prevent discriminations. The corporation commission shall make reasonable and just rules and regulations—

1. To prevent discrimination in the transportation of freight or passengers.
2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates charged for freight, express or passengers.

1899, c. 164, s. 2, subsecs. 3, 5.

1162. Telegraph and telephone rates. The commission shall have power and are directed to make just and reasonable rates of charges for the transmission of messages by any telegraph or telephone company or corporation doing business in this state, and for the rental of telephones.

1899, c. 164, s. 2, subsecs. 10, 11.

1163. Stations and depots. The commission is empowered and directed—

1. To require, where the public necessity demands and it is demonstrated that the revenue received will be sufficient to justify it, the establishment of stations by any company or corporation engaged in the transportation of freight and passengers in this state, and to require the erection of depot accommodations commensurate with such business and revenue: Provided, the commissioners shall not require any company or corporation to establish any station nearer to another station than five miles.

1899, c. 164, s. 2, subsec. 12.

2. To require a change of any station or the repairing, addition to or change of any station house by any railroad or other transportation company in order to promote the security, convenience and accommodation of the public and to require the raising or lowering of the track at any crossing when deemed necessary.

1899, c. 164, s. 2, subsec. 13.

3. To require when practicable, and when the necessities of the case, in the judgment of the corporation commission, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation and convenience of traveling public, and to unite in the joint undertaking and expense of erecting, constructing and maintaining such union passenger depot, commensurate with the business and revenues of such railroad companies or corporation, on such terms, regulations, provisions and conditions as the commission shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad: Provided, that nothing in this section shall be construed to authorize the commission to require the construction of such union depot should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the corporation commission, are adequate and convenient and offer suitable accommodations for the traveling public.

1903, c. 126.

4. To require the establishment of separate waiting-rooms at all stations for the white and colored races.

1899, c. 164, s. 2, subsec. 14.

5. To require the construction of side tracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such side track is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the commission authority to require railroad companies to construct side tracks more than five hundred feet in length.

1899, c. 164, s. 2, subsec. 15.

1164. Depots not abandoned. A railroad corporation which has established and maintained for a year a regular passenger station or freight depot at a point upon its road shall not abandon such station or depot, nor substantially diminish the accommodation furnished by the stopping of trains except by consent of the commission. Freight or passenger depots may be relocated upon the written approval of the commission.

1899, c. 164, ss. 19, 20.

1165. Freight and passenger rates. The commission shall make reasonable and just rates—

1. Of freight, passenger and express tariffs for railroads, street railways, steamboats, canal and express companies or corporations,

and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

2. For the through transportation of freight, express or passengers.

3. Of charges for the transportation of packages by any express company or corporation.

4. Of charges for the use of railroad cars carrying freight or passengers.

5. And rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

6. And shall make, require or approve what is known as "milling-in-transit" rates on grain; or lumber to be dressed and shipped over the line of the railroad company on which such freight originated.

7. And, conjointly with such railroad companies shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commission.

1899, c. 164, ss. 2, 14; 1903, c. 683.

1166. Demurrage; storage; placing and loading of cars. The commission shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment.

1903, c. 342.

1167. May fix rate of speed trains may run through a town; petition to be filed; procedure. If any railroad company shall be of the opinion that an ordinance of a city or town through which a line of its railroad passes, except in the counties of Cumberland, Rockingham and Wayne, regulating the speed at which trains may run while passing through said city or town, is unreasonable or oppressive, such railroad company may file its petition before the corporation commission, setting forth all the facts, and asking relief against such ordinance, and that the corporation commission prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, in a registered letter, to the mayor or chief officer of the town or municipality, together with a notice from the corporation com-

mission, setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the city or town named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the corporation commission shall hear the petition: Provided, that any hearing granted by the corporation commission, as authorized by this section, shall be had at the town, city or locality where the conditions complained of are alleged to exist, or some member of the said commission shall take evidence both for the petition and against it, at such city, town or locality, and report to the full commission before any decision is made by the commission.

1903, c. 552.

1168. To pass on ordinance, and fix rate of speed. Either party, petitioner or respondent, shall have the right to introduce testimony and to be heard by counsel, and the corporation commission, after hearing the petition, answer, evidence and argument, shall render judgment thereon. If the commission shall find that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall pay all the costs to be taxed by the clerk to the corporation commission. If the corporation commission shall be of the opinion that the ordinance is unreasonable, it shall so adjudge; and in addition thereto it shall prescribe the maximum rates of speed for passing through such town. And thereafter the railroad company may run its trains through such town or city at speeds not greater than those prescribed by the corporation commission, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company.

1903, c. 552, s. 2.

1169. When costs on hearing to fix rate of speed in discretion of commission. If the judgment of the corporation commission shall be in favor of the petition, it shall be lawful for the corporation commission to make such order as to the payment of the costs as shall seem just. It may require either party to pay the same or it may divide the same. The costs in such proceeding shall be the same as are fixed by law for similar services in the superior court.

1903, c. 552, s. 3.

VIII. RATES.

1170. How fixed. In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter the commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used

for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the fair value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the state; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs.

1899, c. 164, s. 2, subsec. 1.

1171. What may be carried free. Nothing in this chapter shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, states or municipal governments or for charitable or educational purposes; or for any corporation or association incorporated for the preservation and adornment of any historic spot, or to the employees or officers of such company or association while travelling in the performance of their duties, provided they shall not travel further than ten miles one way on any one trip free of charge or to or from fairs or exhibitions for exhibition thereat; or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the free transportation of persons travelling in the interest of orphan asylums or homes for the aged and infirm, or any department thereof, or ex-Confederate soldiers attending annual reunions, or the issuance of mileage, excursion or commutation passenger tickets; or to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers, and of soldiers and sailors' orphan homes, including those about to enter and those returning home after discharge under arrangements with the boards of managers of said homes; or to prevent railroads from giving free carriage to their own officers and employees and members of their families, or to prevent the principal officers of any railroad company from exchanging passes or tickets with other railroad companies for their officers or employees. The commissioners and their clerks shall be transported free of charge over all railroads and other transportation lines which are under the supervision of the commission; and when traveling on official business they may take with them experts or other agents whose service they may deem temporarily of public importance.

1899, c. 164, s. 22; 1899, c. 642; 1901, c. 679, s. 2; 1901, c. 652.

1172. Revision of rates. The commission shall from time to time, and as often as circumstances may require, change and revise or cause to be changed and revised any schedules of rates fixed by the commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company.

1899, c. 164, s. 7.

1173. Long and short hauls. It shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the commission, such common carrier may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, that nothing in this chapter contained shall be taken as in any manner abridging or controlling the rates of freight charged by any railroad in this state for conveying freight which comes from or goes beyond the boundaries of the state and on which freight less than local rates on any railroad carrying the same are charged by such railroads.

1899, c. 164, s. 14.

1174. Contracts as to rates. All contracts and agreements between railroad companies as to rates of freight and passenger tariffs shall be submitted to the commission for inspection and correction, that it may be seen whether or not they are a violation of law or of the rules and regulations of said commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies shall be submitted to the commission for inspection and approval in so far as they affect the rules and regulations made by the commission to secure to all persons doing business with such companies just and reasonable rates of freight and passenger tariffs, and the commission may make such rules and regulations as to such contracts and agreements as may then be deemed necessary and proper, and any such agreements not approved by the commission, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held and taken to be violations of this chapter and shall be illegal and void.

1899, c. 164, s. 6.

1175. Published. All carriers shall, whenever required by the commission, file with it a schedule of their rates of charges for freight and passengers, and the commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules if they deem it advisable.

1899, c. 164, s. 7.

1176. Interstate commerce. Upon the complaint of any person to the commission of any unjust discrimination in carrying freight which comes from or goes beyond the boundaries of the state by any railroad company, whether organized under the laws of this state or of another state and doing business in this state, the commission shall investigate such complaint, and if the same be sustained it shall be the duty of the commission to bring such complaint before the interstate commerce commission for redress in accordance with the provisions of the act of Congress establishing the interstate commerce commission. They shall receive upon application the services of the attorney general of the state and he shall represent them before the interstate commerce commission.

1899, c. 164, s. 14.

1177. Duplicate freight receipts; charges stated; freight delivered on payment of charges. All railroad companies shall on demand issue duplicate freight receipts to shippers in which shall be stated the class or classes of freight shipped, the freight charges over the road giving the receipt, and so far as practicable shall state the freight charges over the roads that carry such freight. When the consignee presents the railroad receipt to the agent of the railroad that delivers such freight such agent shall deliver the articles shipped upon payment of the rate charged for the class of freight mentioned in the receipt.

1899, c. 164, s. 17.

1178. Schedule of rates, evidence. The schedule containing rates fixed by the commission shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads. All such schedules shall be received and held in all suits as prima facie evidence, the schedules of the commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the com-

mission that the same is a true copy of the schedule prepared or approved by it for the railroad company or corporation therein named.

1899, c. 164, s. 7.

IX. DUTIES.

1179. Notice given of violations; suits instituted. The commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice shall forthwith present the facts to the attorney general, who shall take such proceedings thereon as he may deem expedient.

1899, c. 164, s. 8.

1180. Fees paid to treasurer. All license fees and seal tax and all other fees paid into the office of the corporation commission shall be turned into the state treasury; also all moneys received from fines and penalties.

1899, c. 164, ss. 33, 26.

1181. Record of receipts and disbursements. The commission shall keep a record showing in detail all receipts and disbursements.

1899, c. 164, s. 34.

1182. Fiscal year. The fiscal year for which all reports shall be made which may be required of any railroad or transportation company by the commission under this chapter shall end on the thirtieth of June.

1899, c. 164, s. 28.

1183. Report of commission. It shall be the duty of the commission to make to the governor annual reports of its transactions, and recommend from time to time such legislation as it may deem advisable under the provisions of this chapter, and the governor shall have one thousand copies of such report printed for distribution.

1899, c. 164, s. 27.

1184. Expenses. All the expenses of the commission, except as otherwise provided by law, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders in making any investigation, or upon official business, or for any other purposes necessary for carrying out the provisions of this chapter, and necessary furniture, stationery, postage, lights and heat, shall be allowed, and the auditor shall issue his warrant upon presentation of itemized vouchers therefor approved by the chairman of the commission: Provided, that the

expenses allowed under this section shall not exceed three thousand six hundred dollars annually.

1899, c. 164, s. 32; 1899, c. 688.

NOTE. For servant for commission, see Salaries and Fees—Laborers.

X. TAX COMMISSIONERS.

1185. Tax commissioners. The members of the corporation commission shall constitute a board of "State Tax Commissioners," with the powers and duties prescribed by law.

1901, c. 7, ss. 1, 3; 1903, c. 251, ss. 1, 3.

1186. Clerk. The clerk of the corporation commission shall be clerk to the board of "State Tax Commissioners" and shall have custody of the records of all proceedings of said board; and such records shall be and constitute a part of the records of the office of the clerk of the corporation commission.

1901, c. 7, s. 2; 1903, c. 251, s. 2.

1187. Place of meeting. The corporation commission as "State Tax Commissioners" shall hold regular meetings, at the office of said commission in the city of Raleigh, on the first Tuesday of March, June, July, August, September and October of each year. Special sessions may be held whenever and wherever the chairman may direct, and shall be held at such places as the corporation commission may order. The time and place of any regular meeting may be changed by an order of the corporation commission, due notice being given of such change. The sessions shall continue so long as may be necessary and may be adjourned from time to time.

1901, c. 7, ss. 4, 5; 1903, c. 251, ss. 4, 5.

1188. Examination of papers. The board, and every member thereof, shall have access to and the right to examine, all books, papers, documents, statements and accounts on file or of record in any of the departments of state, or in any county, township or municipality. The examinations shall be made subject to the rules and regulations of the respective departments of state, counties, townships or municipalities relative to the care of public records. The board shall have the right to examine the books, papers, accounts or records of any corporation, firm or individual owning property liable to assessment for taxes, general or specific, under the laws of the state.

1901, c. 7, s. 4; 1903, c. 251, s. 4.

1189. Duties. The state tax commissioners shall—**1. HAVE GENERAL SUPERVISION OVER LIST-TAKERS.**

Have and exercise general supervision over the tax-listers and assessing officers, take such measures as will secure the enforcement of the provisions of this subchapter, to the end that all the properties liable to assessment for taxation shall be placed upon the assessment rolls and assessed at their true value in money.

2. ADVISE ASSESSORS; ENFORCE PENALTIES.

Confer with and advise assessing officers as to their duties under the law, and institute proper proceedings to enforce the penalties and liabilities provided by law for public officers, officers of corporations and individuals failing to comply with the law requiring property to be listed for taxation; prefer charges to the governor against assessing and taxation officers who violate the law or fail in the performance of their duties in reference to assessments and taxation; and in the execution of these powers the said commissioners may call upon the attorney general or any prosecuting attorney to assist said commissioners.

3. RECEIVE COMPLAINTS.

Receive complaints as to property liable to taxation that has not been assessed, or has been fraudulently or improperly assessed, and to investigate the same, and to take such proceedings as will correct the irregularity complained of, if found to exist.

4. VISIT COUNTIES.

See that each county be visited by at least one member of the commission as often as once a year, to the end that all complaints concerning the law of assessment and taxation may be heard; that information concerning its workings may be collected; that all assessing and taxation officers comply with the law, and all violations thereof be punished, and that all proper suggestions as to amendments and changes may be made.

5. REQUIRE REPORTS; PENALTY.

Require any officer to make, on forms prescribed by the state tax commissioners, such annual or other reports as shall enable the commission to ascertain the assessed valuation of all property listed for taxation; the amount of taxes assessed, collected and returned delinquent, and such other matter as the commission may require, to the end that it may have complete and statistical information as to the

practical operation of the law as to taxation. Every such officer mentioned in this section who shall wilfully neglect or refuse to furnish any report required by the commission, for the purposes of the law, or who shall wilfully and unlawfully hinder, delay or obstruct said commission in the discharge of its duties, shall forfeit and pay one hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report shall raise the presumption that the same was wilful.

6. MAKE INVESTIGATIONS INTO LAWS OF OTHER STATES.

Make diligent investigation and inquiry concerning the revenue laws and systems of other states and countries, so far as the same is made known by published reports and statistics, and can be ascertained by correspondence with officers thereof, and, with the aid of information thus obtained, together with experience and observation of our own laws, to recommend to the general assembly at each regular session thereof, such amendments, changes or modifications of our revenue laws as seem proper and necessary to remedy injustice and irregularities in taxing and to facilitate the assessment and collection of public revenues.

7. REPORT TO GENERAL ASSEMBLY.

Report to the general assembly at each regular session thereof, or at such times as the general assembly may direct, the whole amount of taxes collected in the state, for all purposes, classified as to state, county, township and municipal purposes, with the sources thereof, the amount lost, the cause of the loss, the proceedings of said commission, and such other matters of information concerning the public revenues as it may deem of public interest.

1903, c. 251, s. 6.

1190. Board of equalization. After the various tax lists required to be made by law shall have been passed upon by the county board of equalization, the said several tax lists shall be subject to inspection by the state tax commissioners, or by any member thereof; and in case it shall appear or be made to appear to said commission that property subject to taxation has been omitted from said list or individual assessments have not been made in compliance with law, the said commission may issue an order directing the assessor or lister, whose assessments or failure to assess are complained against, to appear with his list at a time and place to be stated in said order, said time to be not less than seven days from the date of issuance of said order, and the place to be at the office of the board of county commissioners at the county seat, or such other place in said county

in which said roll was made, as said board shall deem most convenient for the hearing herein provided for.

1903, c. 251, s. 5.

1191. Hearing; judgment; how tax list corrected. The said commission, or any member thereof, shall then and there hear and determine as to the proper assessments of all property and persons mentioned in said notice, and persons affected or liable to be affected by the review of said assessments thus provided for, may appear and be heard at said hearing. In case said commission, or the member thereof who shall act in said review, shall determine that the assessments so reviewed are not assessed according to law, he or they shall, in a column provided for that purpose, place opposite said property the true and lawful assessment of the same. As to the property not on the tax list, the said commission, or member thereof acting in said review, shall place the same upon said tax list by proper description, and shall place thereafter in the proper column the true cash value of the same. In case of review under this section, the said commission, or the member thereof acting in said review, shall certify under his hand officially and spread upon said list a certificate of the day and date at which said tax list was reviewed by him, and the changes made by him therein.

1903, c. 251, s. 8.

1192. General review of tax list. Whenever it shall appear to said commission that any tax list is so grossly irregular and unlawfully assessed that adequate compliance with the law can not be secured except by a general review of said tax list, said commission may make and issue an order that said tax list shall be subject to general review, and the time and place shall be stated in said order, at which said list shall be reviewed, and under said order the assessor whose assessment or failure to assess is complained against shall be required to appear with his tax list at the time and place thus determined, said time to be not less than fourteen days from the issuance of the order, and the place to be at the office of the board of county commissioners at the county seat, or such other place in said county in which said list was made, as said commission shall deem most convenient for the hearing herein provided for.

1903, c. 251, s. 9.

1193. Who acts on general review; judgment. The said commission, or any member thereof, together with the chairman of the board of county commissioners, shall then and there review said tax list and the assessment of property therein, and he or they shall have power to determine in accordance with law the amount at which said assessment shall be placed, and to change the same so

that said assessments may comply with the law. Also to place upon said list property omitted therefrom in the same manner as provided in the preceding sections. The determination of said commission, or member thereof acting in said review, shall be placed in a column provided for that purpose, and they or he shall proceed in all respects as provided in the preceding sections.

1903, c. 251, s. 9.

1194. Property omitted, how listed. If it shall appear to said commission at any time that any property liable to taxation has not been assessed for any previous year as required by law, the said commission shall report the same to the proper assessing officer, and the same shall be listed for taxation upon the next tax list that shall be made, and shall be valued as all other property. The said commission shall further certify to the board of county commissioners of the several counties at the October session thereof next after said property shall be then listed for taxation, and said board of county commissioners shall ascertain the rate of taxation for said several years, and shall order the taxes for said several years to be entered against said property upon the valuation for the then current year, and the same shall be so entered in a column provided for that purpose, and it shall constitute a charge against the person or property, and be collected as other taxes: Provided, that in case of change of ownership of the property omitted, said taxes shall not be entered against said property prior to the last change of ownership; and no taxes shall be assessed further back than the year one thousand nine hundred and three.

1901, c. 7, s. 10; 1903, c. 251, s. 10.

1195. Notice of meeting as board of equalization. Notice of the time and place that said assessor or lister is ordered to appear, with said list, shall be published in a newspaper published at the county seat in said county, if there be one; if not, in some paper printed in said county, if there be any, at least five days before the time at which said assessor or lister is required to appear, and personal notice shall be given by mail to said persons whose property or whose assessments are to be considered, at least five days prior to said hearing. If the review be general such fact shall be stated in the notice, and that all persons interested will be heard at such time. A copy of the order shall also be served upon the tax officer in whose possession such list shall be, at least three days before he is required to appear with such list. The commission, or any member thereof, shall appear at the time and place mentioned in said order, and the assessing or listing officer upon whom said notice shall have been served shall appear also with said tax list.

1903, c. 251, s. 8.

1196. Fees of assessors; action of the commission final. For appearing with said list as required by law, the tax officer shall receive the same pay per diem as is received by him in the preparation of the tax list, to be presented to and paid by the proper officers of the county or municipality of which he is the assessing officer in the same manner as his other compensation is paid. The action of said commission, or member as provided in this subchapter, shall be final.

1903, c. 251, s. 8.

1197. Report made. The state tax commission shall, on or before the first day of November of each year, make an annual report to the governor of this state, setting forth the workings of said commission during the preceding year, and containing the findings and recommendations of said commission in relation to all matters of taxation. The auditor shall cause two thousand copies of said report to be printed on or before the first day of December succeeding the making of said report. Five hundred copies of said report shall be placed at the disposal of the secretary of state for distribution and exchange, and a copy of said report shall be forwarded by said tax commission to each member of the general assembly as soon as printed.

1903, c. 251, s. 7.

CHAPTER 21.

COSTS.

| | Sections. |
|--|-----------|
| I. Generally, | 1198—1207 |
| II. State liable, when, | 1208—1212 |
| III. Civil actions and proceedings, | 1213—1226 |
| IV. On appeals, | 1227—1229 |
| V. Liability of counties, in criminal actions, | 1230—1237 |
| VI. Liability of defendant, in criminal actions, | 1238—1241 |
| VII. The prosecutor, | 1242—1244 |
| VIII. Witnesses, | 1245—1253 |
| IX. Criminal costs before justices, | 1254—1255 |

I. GENERALLY.

1198. What allowed. To either party for whom judgment shall be given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same.

Code, s. 528.

1199. Summary judgment for uncollected. If any officer, to whom fees are payable by any person, shall fail to receive them at the time the service is performed, he may have judgment therefor on motion to the court in which the action is or was pending, upon twenty days' notice to the person to be charged, at any time within one year after the termination of the action in which the same was performed; if the motion for judgment be in behalf of the clerk of the superior court, it shall be made to the judge of the court in or out of term.

Code, s. 3760; 1868-9, c. 279, s. 561.

1200. Judgment and execution for, against sureties on prosecution or appeal bond. Whenever an action shall be brought in any court in which security shall be given for the prosecution thereof, or when any case shall be brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit shall have been given, and judgment shall be rendered against the plaintiff for the costs of the defendant, the appellate court, upon motion of the defendant, shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety.

Code, s. 543; R. C., c. 31, s. 126; 1831, c. 46.

1201. Executions for, when issued; irregular if not itemized. The clerks of the supreme, superior and criminal courts, where suits are determined and the fees are not paid by the party from whom they are due, shall sue out executions, directed to the sheriff of any county in the state, who shall levy them as in other cases; and to the said execution shall be annexed a bill of costs, written in words, so as plainly to show each item of costs, and on what account it is taxed; and all executions for costs, issuing without such a bill annexed, shall be deemed irregular, and may be set aside as to the costs, at the return term, at the instance of him against whom it is issued.

Code, s. 3762; R. C., c. 102, s. 24.

1202. Juror's tax fees. On every indictment or criminal proceeding, tried or otherwise disposed of in the superior, or criminal courts, the party convicted, or who shall be adjudged to pay the costs, shall pay a tax of two dollars. In every civil action in any court of record, the party who shall be adjudged to pay the costs shall pay a tax of three dollars; but this tax shall not be charged unless a jury shall be impaneled. Said tax fees shall be charged by the clerks in the bill of costs, and collected by the sheriff, and by him paid into the county treasury. And the fund

thus raised in any county, shall be set apart for the payment of the jurors attending the courts thereof.

Code, s. 732; R. C., c. 28; 1830, c. 1; 1879, c. 325; 1881, c. 249.

1203. Criminal, not demandable in advance. In all cases of criminal complaints before justices of the supreme court, judges of the superior and criminal courts, justices of the peace and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process shall not be entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable.

Code, s. 1173; 1868-9, c. 178, subch. 2, s. 40.

1204. Clerk to insert, in entry of judgment. The clerk shall insert in the entry of judgment the allowances for costs allowed by law, and the necessary disbursements, including the fees of officers and witnesses, and the reasonable compensation of referees and commissioners in taking depositions. The disbursements shall be stated in detail. Whenever it shall be necessary to adjust costs in any interlocutory proceedings, or in any special proceedings, the same shall be adjusted by the clerk of the court to which the proceedings were returned, except in those matters in which the allowance is required to be made by the judge.

Code, s. 532.

1205. Bills of criminal costs itemized; approved by solicitor. It shall be the duty of the clerks of the several courts of record, at each term of the court, to make up an itemized statement of the bill of costs in every criminal action tried or otherwise disposed of at said term, which shall be signed by the clerk, and approved by the solicitor.

Code, s. 733; 1873-4, c. 116; 1879, c. 264.

1206. Justices required to itemize bills of. In all trials before justices of the peace it shall be lawful for plaintiff or defendant before payment of costs, to demand of the justice before whom a trial is held an itemized statement of costs; and it shall be his duty to insert in the entry of judgment in every criminal action tried or otherwise disposed of by him a detailed statement of the different items of costs, and to whom due.

Code, s. 734; 1887, c. 297.

1207. Bills of, open to the public. Every bill of costs shall at all times be open to the inspection of any person interested therein.

Code, s. 735; 1873-4, c. 116.

II. STATE LIABLE, WHEN.

1208. Civil actions by the state. In all civil actions prosecuted in the name of the state, by an officer duly authorized for that purpose, the state shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the state as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the state till after execution issued therefor against such private party and returned unsatisfied.

Code, s. 536.

1209. Civil actions by and against state officers. In all civil actions depending, or which may be instituted, by any of the officers of the state, or which have been, or shall be instituted against them, when any such action is brought or defended pursuant to the advice of the attorney general, and the same shall be decided against such officers, the costs thereof shall be paid by the state treasurer upon the warrant of the auditor for the amount thereof as taxed.

Code, s. 3373; 1874-5, c. 154.

1210. Civil actions by state for individuals. In an action prosecuted in the name of the state for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the state.

Code, s. 537.

1211. In bribery prosecutions. The expenses which shall be incurred by any county in investigating and prosecuting any charge of bribery or attempt to bribe any state officer or member of the general assembly within said county, and of receiving bribes by any state officer or member of the general assembly in said county, shall be a charge against the state, and the properly attested claim of the county commissioners shall be paid by the treasurer of the state.

Code, s. 742; 1868-9, c. 176, s. 6; 1874-5, c. 5.

1212. On appeal by state to supreme court of United States. In all cases, whether civil or criminal, to which the state of North Carolina is a party, and which may be carried from the courts of this state, or from the circuit court of the United States, by appeal or writ of error to the supreme court of the United States, and the state shall be adjudged to pay the costs, it shall be the duty of the attorney general to certify the amount of such costs to the auditor, who shall thereupon issue a warrant for the same, directed to the

state treasurer, who shall pay the same out of any moneys in the treasury not otherwise appropriated.

Code, s. 538; 1871-2, c. 26.

III. CIVIL ACTIONS AND PROCEEDINGS.

1213. When allowed plaintiff; when limited by amount of recovery. Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

2. In an action to recover the possession of personal property.

3. In actions of which a court of a justice of the peace has no jurisdiction unless otherwise provided by law.

4. In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs than damages.

5. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions shall have been within the state and not secreted at the commencement of the previous action or actions.

Code, s. 525; 1874-5, c. 119; R. C., c. 31, s. 78.

1214. When allowed defendant. Costs shall be allowed as of course to the defendant, in the actions mentioned in the preceding section, unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them.

Code, ss. 526, 527; C. C. P., s. 277.

1215. Discretionary in other actions. In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law.

Code, s. 527.

1216. When in discretion of the court. Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

1. Application for year's support, for widow or children.
2. Caveats to wills.
3. Habeas corpus; and the court shall direct what officer shall tax the costs thereof.
4. In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate as may be just.
5. Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of road supervisors or board of county commissioners may order the costs incurred before them paid in their discretion.
6. The compensation of referees and commissioners to take depositions.
7. All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the chapter entitled "Partition."
8. In all proceedings under the chapter entitled Draining Lowlands, except as therein otherwise provided.
Code, ss. 2134, 2161, 1660, 1294, 2039, 2056, 533, 1422, 1323; 1889, c. 37.
Note. See ss. 54, 58, 302, 367.

1217. Petitioner pays, when. The petitioner shall pay the costs in the following proceedings:

1. In petitions for draining or damming lowlands.
2. In petitions for condemnation of water mill sites when the petitioner is allowed to erect the mill; but when he is not allowed to erect the mill, the costs shall be paid by the person who is allowed to do so.
3. In petitions for condemnation of land for railroads, street railways, telegraph, telephone or electric power or light companies, or for water supplies for public institutions, or for the use of other quasi-public or municipal corporations; unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.
4. When the petition is refused.
Code, ss. 1299, 1855, 2013; 1893, c. 63; 1903, c. 562.

1218. Defendant pays, unreasonably defending action after notice, no personal claim. In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant. If a

defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff.

Code, s. 216.

1219. None allowed to party suing on usurious contract. No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract.

1895, c. 69.

Note. See Interest.

1220. In special proceedings. The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided.

Code, s. 541.

1221. Allowed in supplemental proceedings. The court or judge may allow to the judgment creditor, or to any party examined in proceedings supplemental to execution, whether a party to the action or not, witnesses' fees and disbursements.

Code, s. 499; C. C. P., s. 273.

1222. Laying off homestead and exemptions. The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the latter costs shall be a lien on said homestead.

Code, s. 510.

1223. On re-assessment of homestead. If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant shall be reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining.

Code, s. 521.

1224. Against infant plaintiff, guardian responsible. When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor.

Code, s. 534.

1225. Actions by or against executors, trustees or persons authorized by statute. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person

expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. And whenever any claim against a deceased person shall be referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law.

Code, s. 535.

Note. See ss. 91, 96, 1776.

1226. Assignee after action brought, liable for. In actions in which the cause of action shall become by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party.

Code, s. 539.

IV. ON APPEALS.

1227. Generally. On an appeal from a justice of the peace to a superior court, or from a superior court or a judge thereof, to the supreme court, if the appellant shall recover judgment in the appellate court, he shall recover the costs of the appellate court and those he ought to have recovered below, had the judgment of that court been correct, and also restitution of any costs of the court appealed from which he shall have paid under the erroneous judgment of such court. If in any court of appeal there shall be judgment for a new trial, or for a new jury, or if the judgment appealed from be not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court.

Code, s. 540.

1228. From justices of the peace. After an appeal from the judgment of a justice of the peace shall be filed with a clerk of a superior court, the costs in all subsequent stages shall be as herein provided for actions originally brought to the superior court.

Code, s. 542.

1229. Not allowed plaintiff unless his recovery is greater than before justice. If on appeal from a justice of the peace judgment be entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the

costs of the appeal, but shall be liable at the discretion of the court to pay the same.

Code, s. 566; R. C., c. 31, s. 106; 1794, c. 414, s. 17.

V. LIABILITY OF COUNTIES IN CRIMINAL ACTIONS.

1230. County pays, when. If there be no prosecutor in a criminal action, and the defendant shall be acquitted, or convicted and unable to pay the costs, or a nolle prosequi be entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees only; except in capital felonies and in prosecutions for forgery, perjury and conspiracy, when they shall receive full fees. And in the following counties the county shall pay one-half their lawful fees, when "not a true bill" is found: Bertie, Clay, Davie, Duplin, Gaston, Granville, Greene, Henderson, Iredell, Johnston, Madison, McDowell, Mecklenburg, Montgomery, Northampton, Onslow, Orange, Pamlico, Pitt, Richmond, Rowan, Stanly, Stokes, Surry, Wake, Wilkes and Yadkin. And no county shall pay any such costs, unless the same shall have been approved, audited and adjudged against the county as provided in this chapter.

Code, ss. 733, 739; 1901, cc. 715, 765; 1903, cc. 57, 73, 288, 298, 581; R. C., c. 28, s. 8; R. S., c. 28, s. 12; 1874-5, c. 247.

1231. County liable in supreme court, when. If on appeal to the supreme court in criminal actions the defendant is successful, the county from which the appeal was taken shall pay one-half the costs of the appeal, and all such sums as have been properly expended by the defendant for the transcript of the record and printing done under the rules of the court.

1232. County where offense committed to pay costs; if not paid, prisoner returned. In all cases where the county is liable to pay costs, that county wherein the offense is alleged to have been committed shall be adjudged to pay them. The costs taxed in any case removed from another county for trial shall include the fees and expenses allowed for summoning the special venire, if one is ordered in the case, and the per diem and mileage of jurors who are empaneled to try the case, together with all other costs and expenses of the trial of the case, the amount of which, if not provided for by law, to be fixed by the presiding judge, so as to fully relieve the county in which the trial is had of all costs and expenses thereof. All fines, forfeitures, penalties and amercements imposed or levied in the case shall belong to the county from which the case was removed and be paid to the treasurer of said county. When a prisoner is sent from one county to another to be held for trial, or for

any other cause or purpose, the county from which he is sent shall pay his prison expenses, unless the same shall be collected from him on or before the first Monday in each month, and upon a failure to do so, it shall be the duty of the county to which he is sent to pay the same to the sheriff or jailer entitled to receive it at the same rate and under the same regulations as its own prison expenses are paid; and the county liable shall repay the same within thirty days after demand, and upon failing to do so the county to which the money is due shall be entitled to recover in the superior court, or, if the amount be within its jurisdiction, the court of justices of the peace of its own county, the amount due, with ten per cent. additional, together with eight per cent. interest on the sum due; and said courts of said county shall have full jurisdiction to hear, try and determine all actions and proceedings that may be brought for the purpose of enforcing the collection of the same: Provided, that when the county to which such prisoner has been sent has paid the prison expenses and has made demand therefor upon the county liable as above provided and such demand be not complied with within ten days, the sheriff or jailer shall at once return such prisoner to the county from which such prisoner was sent, and deliver him to the sheriff or jailer thereof.

1889, c. 354; 1901, c. 718.

1233. Statement of, chargeable to county, filed with commissioners. In all criminal actions where the county is liable in whole or in part for costs, it shall be the duty of the clerks of the courts to make out a statement of such costs from the record or docket, within thirty days after the hearing, trial, determination, or other disposition thereof, and file the same with the board of commissioners of the county.

Code, s. 736; 1873-4, c. 116, s. 3.

1234. Expense incurred in going after prisoner, how paid. When a sheriff or other officer shall arrest a person under a *capias* or other legal process, which requires him to have the person arrested before a court or judge of another county, and such sheriff or other officer shall be obliged to incur expense in the safe delivery of such person by reason of his failing to give bond for his appearance, or if the sheriff or other officer of the county to which the prisoner is to be carried shall incur any expense in going for and conveying said prisoner to his county, then in either case, the sheriff or other officer shall file with the court or judge issuing the *capias* or other legal process and with the register of deeds an itemized and sworn account of such expenses, which shall be presented by the register to the board of commissioners at their next regular meeting to be audited by them. Such sworn statement shall be received by the said board as *prima*

facie correct. Upon such auditing the board of commissioners shall cause to be issued to such sheriff or other officer an order on the county treasurer for the amount so audited and allowed by them, and shall notify the court or judge of their action, to the end that the amount so allowed shall be taxed in the costs to the use of the county.

1885, c. 262; 1901, c. 64.

1235. Lynchings, costs of investigation. In all cases of investigation and trial of the crime of lynching, the entire cost incurred in the prosecution, unless paid by the person or persons convicted, shall be paid by the county wherein the crime shall have been committed. And whenever any solicitor goes to a county to investigate a crime of breaking or entering a jail for the purpose of lynching, the county where such crime is committed shall pay the solicitor the sum of one hundred dollars for making the investigation.

1893, c. 461, s. 6.

1236. When county pays state's witnesses. Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior or criminal courts where the defendant is insolvent, or by law shall not be bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence in behalf of the state, and the defendant shall be discharged, and in cases where the defendant shall break jail and shall not afterwards be retaken, the court shall order the witnesses to be paid.

Code, s. 740; R. C., c. 28, s. 9; 1804, c. 665; 1819, c. 1008; 1824, c. 1253.

1237. When county pays defendant's witnesses. When the defendant shall be acquitted, a nolle prosequi entered, or judgment against him arrested, and it shall be made to appear to the court, by certificate of counsel or otherwise, that said defendant had witnesses, duly subpœnaed, bound or recognized, in attendance, and that they were necessary for his defense, it shall be the duty of the court, unless the prosecutor be adjudged to pay the costs, to make and file an order in the cause directing that said witness be paid by the county in such manner and to such extent as is authorized by law for the payment of state's witnesses in like cases.

Code, s. 747; 1879, c. 264; 1881, c. 312.

VI. LIABILITY OF DEFENDANT IN CRIMINAL ACTIONS.

1238. When defendant pays. Every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution.

Code, s. 1211; R. C., c. 35, s. 46.

1239. Defendant imprisoned, detained until cost paid. If the sentence be that the guilty person be imprisoned for a time certain, and that he pay the costs, there shall be added to it that he shall remain in prison after the expiration of the fixed time for his imprisonment until the costs shall be paid, or until he shall otherwise be discharged according to law.

Code, s. 905; 1868-9, c. 178.

1240. Confession of judgments to secure fine and cost. In cases where a court, mayor or a justice of the peace permits a defendant convicted of any criminal offense, to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid.

Code, s. 749; 1885, c. 364; 1879, c. 264.

1241. Defendant failing to pay, may be arrested. In default of payment of such fine and costs, it shall be the duty of the court at any subsequent term thereof on motion of the solicitor of the state to order a *capias* to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law; and a justice of the peace or mayor may at any subsequent time arrest the defendant and hold him for the fine and costs until discharged according to law.

Code, s. 750; 1885, c. 364; 1879, c. 264.

VII. THE PROSECUTOR.

1242. Who is prosecutor; when pays costs. In all criminal actions, if the defendant be acquitted, *nolle prosequi* entered, judgment against him arrested, or if the defendant shall be discharged from arrest for want of probable cause, the costs, including the fees of all witnesses summoned for the accused, whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defense, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice shall be of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public

interest. And every judge, court or justice is hereby fully authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment shall have been found, or the defendant acquitted: Provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of records.

Code, s. 737; 1889, c. 34; R. C., c. 35, s. 37; 1799, c. 4, s. 19; 1800, c. 558; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49.

1243. Pay of witnesses in criminal cases. All witnesses summoned or recognized in behalf of the state shall be allowed the same pay for their daily attendance, ferriage and mileage as is allowed to witnesses attending in civil suits; and such fees for attendance shall be paid by the defendant, only upon conviction, confession or submission; and if the defendant be acquitted on any charge of an inferior nature, or a *nolle prosequi* be entered thereto, the court shall order the prosecutor to pay the costs, if such prosecution shall appear to have been frivolous or malicious; but if the court shall be of opinion that such prosecution was neither frivolous nor malicious, and a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, nevertheless, order the prosecutor to pay the attendance of such unnecessary witnesses, if it appear that they were summoned at his special request.

Code, s. 1204; R. C., c. 35, s. 37; 1800, c. 558, s. 1; 1879, c. 49; 1879, c. 92, s. 3; 1881, c. 176.

1244. When imprisoned for. Every such prosecutor may be adjudged not only to pay the costs, but he shall also be imprisoned for the nonpayment thereof, when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious.

Code, s. 738; R. C., c. 35, s. 37; 1800, c. 558; 1879, c. 49; 1881, c. 176.

VIII. WITNESSES.

1245. Not entitled to, in advance. Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the state or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned, shall, after one day's attendance on request and presentation of a certificate, fail or refuse to pay what then may be due, for traveling to the place of examination, and for the number of days of attendance.

Code, s. 1368; 1868-9, c. 279, subsec. 11, s. 3.

1246. Must prove attendance; may recover therefor. Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the state and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. Where recovery may be had before a justice of the peace on a witness ticket, the justice shall deface it by writing the word judgment, and deliver the same to the person of whom it is recovered.

Code, s. 1369; R. C., c. 31, s. 73; 1777, c. 115, s. 46; 1796, c. 458; 1868-9, c. 279, subchap. 11, ss. 2, 4.

1247. Tickets filed with clerk; only two to prove same fact. At the court where the cause shall be finally determined the party recovering judgment shall file in the clerk's office the witness tickets; the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party. The party cast shall not be obliged to pay for more than two witnesses to prove a single fact.

Code, s. 1370; R. C., c. 31, s. 74; 1783, c. 189, s. 3; 1796, c. 458, s. 2.

1248. Pay of, before jury of view or commissioner. Witnesses summoned to appear at any survey, or before any jury of view, or before any commissioner, arbitrator, referee, or other person authorized to require their attendance, shall be entitled to the same fees as for similar attendance at the court of the county, and may prove, by their own oath, their attendance, mileage, and ferriage before such person, who is hereby authorized to administer the oath; and when they shall attend on any commission issuing from without the state, they may recover the fees for attendance against the party summoning them, or his agent or attorney directing them to be summoned; and when they shall attend under a commission or authority from any court in this state, the fees for attendance shall be proved as afore-said, and be certified to the proper court and taxed among the costs of the cause, as if the witness had attended the court; but nevertheless, such fees may be immediately recovered against the party summoning.

Code, s. 1365; R. C., c. 31, s. 67; 1805, c. 685; 1848, c. 66; 1850, c. 188, s. 3.

1249. When witness before grand jury. No witness shall receive pay for attendance in a criminal case before a grand jury unless such witness shall have been summoned by direction in writing of the

foreman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name of the parties against whom his testimony may be needed, or shall have been bound or recognized by some justice of the peace to appear before the grand jury.

Code, s. 743; 1879, c. 264.

1250. State's paid, when; only two paid; one attendance, one day. No person shall receive pay as a witness for the state on the trial of any criminal action unless such person shall have been summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed; and no solicitor shall direct that more than two witnesses shall be summoned for the state in any prosecution for a misdemeanor, nor shall any county or defendant in any such prosecution be liable for or taxed with the fees of more than two witnesses, unless the court, upon satisfactory reasons appearing, shall otherwise direct. And no witness summoned in a criminal action or proceeding shall be paid by the county for attendance in more than one case for any one day; nor shall the county be required to pay any such witness if his attendance shall be taxed in more than one case on the same day.

Code, s. 744; 1871-2, c. 186; 1879, c. 264.

1251. Only two bound over on appeal in criminal action. When the defendant shall appeal from the judgment of the justice of the peace, in any criminal action, it shall be the duty of such justice of the peace to select and bind over on behalf of the state not more than two witnesses, and neither the county nor the defendant shall be liable for the fees of more than two witnesses on such appeal, unless additional witnesses shall be summoned by order of the appellate court as provided in the preceding section.

Code, s. 745; 1879, c. 264.

1252. How discharged; certificate of attendance filed. It shall be the duty of all solicitors prosecuting in the several courts, as each criminal prosecution shall be disposed of by trial, removal, continuance or otherwise, to call and discharge the witnesses for the state, either finally or otherwise, as the disposition of the case may require; and he shall thereupon file with the clerk of the court a certificate giving the names of the witnesses entitled to prove their attendance, with the date of their discharge. The said certificate shall be in the following or similar form, and blanks thereof shall be furnished to the solicitor by the clerk at the county expense, viz.:

North Carolina, County.

..... Court, Term, 19....

State v.

Witness

discharged....day of.....19...., Solicitor.

Code, s. 746; 1879, c. 264; 1881, c. 312.

1253. Not paid unless certified; discretion of judge. No county, prosecutor or defendant, shall be liable to pay any witness, nor shall his fees be embraced in the bill of costs to be made up as hereinbefore provided, unless his name be certified to the clerk by the solicitor, or included in the order of the court. And the judge or justice may, in his discretion, for satisfactory cause appearing, direct that the witnesses, or any of them, shall receive no pay, or only a portion of the compensation authorized by law: Provided, that the court, at any time within one year after judgment, may order that any witness may be paid, who for any good reason satisfactory to the court failed to have his fees included in the original bill of costs.

Code, ss. 733, 748; 1879, c. 264; 1881, c. 312.

IX. CRIMINAL COSTS BEFORE JUSTICES.

1254. Who pays in justice's court. The party convicted in a criminal action, or proceeding before a justice, shall always be adjudged to pay the costs; and if the party charged be acquitted, the complainant shall be adjudged to pay the costs, and may be imprisoned for the nonpayment thereof, if the justice shall adjudge that the prosecution was frivolous or malicious. But in no action or proceeding of which he has final jurisdiction, commenced or tried in a court of a justice of the peace, shall the county be liable to pay any costs.

Code, s. 895; 1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176.

1255. Defendant imprisoned for. If the justice shall sentence the party found by him to be guilty to pay a fine and costs, and the same shall not be immediately paid, the justice shall commit the guilty person to the county jail until the same shall be paid, or until he shall be otherwise discharged according to law.

Code, s. 904; 1868-9, c. 178, subchap. 4, s. 15.

NOTE. For costs in taking depositions to be used in another state, see Evidence. For costs of advertising for creditors of deceased person, see Administration, s. 39.

For fees to clerk superior court for issuing orders, etc., in guardianship matters, see s. 1776.

For security for costs, see ss. 411, 414.

For execution for costs in supreme court, see Courts—Supreme.

For costs in bastardy cases, see ss. 222, 223; in actions against guardians, see Guardians; in habeas corpus proceedings, see Habeas Corpus; in foreclosing

liens, see Liens; in draining lowlands, see Drainage; when plaintiff refuses to accept tender of judgment, and fails to recover more, see Civil Procedure; in pauper suits, see s. 412; in actions between landlord and tenant, see Landlord and Tenant; in actions to establish public mills, see Mills; in partition proceedings, see Partition; in setting aside widow's year's allowance, see Administration; in laying off roads, see s. 2694; in actions for forfeiture of corporate charter, see s. 1083.

CHAPTER 22.

COUNTY COMMISSIONERS.

| | Sections. |
|------------------------|-----------|
| I. General provisions, | 1256—1257 |
| II. Election of, | 1258—1263 |
| III. Meetings, | 1264 |
| IV. Powers and duties, | 1265—1270 |
| V. Clerk to board, | 1271—1273 |
| VI. County poor, | 1274—1281 |

I. GENERAL PROVISIONS.

1256. Body politic; powers exercised by commissioners. Every county is a body politic and corporate, and shall have the powers prescribed by statute, and those necessarily implied by law, and no others; which powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them.

Code, ss. 702, 703; 1868, c. 20, ss. 1, 2; 1876-7, c. 141, s. 1.

1257. Corporate powers. A county is authorized—

1. To sue and be sued in the name of the county.
2. To purchase and hold lands within its limits and for the use of its inhabitants, subject to the supervision of the general assembly.
3. To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its powers.
4. To make such orders for the disposition or use of its property as the interest of its inhabitants require.

Code, s. 704; 1868, c. 20, s. 3.

NOTE. For service of process, see Civil Procedure.

II. ELECTION OF.

1258. By qualified voters; number. There shall be elected in each county of the state, except those mentioned in section twelve hundred and fifty-nine, at the general election to be held in the year

one thousand eight hundred and ninety-six, and every two years thereafter, by the duly qualified electors thereof, three persons to be chosen from the body of the county, who shall be styled "the board of commissioners for the county of." and shall hold their office for two years from date of their qualification and until their successors shall be elected and qualified. Provided, the number of commissioners shall be five instead of three in the counties of Alamance, Bertie, Beaufort, Buncombe, Cabarrus, Carteret, Catawba, Craven, Cumberland, Durham, Edgecombe, Granville, Guilford, Halifax, Hertford, Johnston, Lenoir, Lincoln, Mecklenburg, New Hanover, Northampton, Pasquotank, Richmond, Robeson, Rockingham, Rowan, Wake and Wayne; and in the county of Gaston seven.

1895, c. 135, s. 4; 1901, c. 14; 1899, c. 153; 1901, c. 382; 1903, c. 228; 1903, c. 265; 1903, c. 36; 1903, c. 137; 1903, c. 59; 1903, c. 790; 1903, c. 14; 1901, c. 581; 1899, c. 147; 1899, c. 301; 1903, c. 7; 1903, c. 515; 1901, c. 60; 1899, c. 467; 1903, c. 203; 1899, c. 450; 1899, c. 609; 1899, c. 103; 1899, c. 346; 1903, c. 207; 1903, c. 206; 1901, c. 330; 1903, c. 4; 1899, c. 187; 1899, c. 297; 1903, c. 46; 1903, c. 446.

1259. By justices of peace. The justices of the peace for each county, on the first Monday in June, one thousand eight hundred and eighty-four, and on the first Monday in June every two years thereafter, shall assemble at the courthouse of their respective counties, and a majority being present, shall proceed to the election of not less than three nor more than five persons, to be chosen from the body of the county, excluding the justices themselves, who shall be styled "the board of commissioners for the county of.," and shall hold their offices for two years from the date of their qualification, and until their successors shall be elected and qualified. This section shall apply only to the counties of Washington, Granville, Caswell, Bertie, Vance, Warren, Franklin, Montgomery, New Hanover.

Code, s. 716; 1899, c. 488; 1887, c. 307; 1903, cc. 191, 207, 790; 1876-7, c. 141, s. 5.

1260. Meetings of justices of the peace in certain counties. For the proper discharge of their duties, the justices of the peace shall meet annually with the board of commissioners on the first Monday in June, unless they shall be oftener convened by the board of commissioners, which is empowered to call together the justices of the peace not oftener than once in three months. For attending such meetings, the justices of the peace shall receive no compensation; but they shall keep a record of their meetings. The register of deeds shall be ex officio the clerk of the justices of the peace, and he shall receive such compensation for his services as the board of commissioners shall provide. This section shall apply only to the counties

1260 COUNTY COMMISSIONERS—II. *Election of.* Ch. 22

of Washington, Granville, Caswell, Bertie, Vance, Warren, Craven, Franklin, Montgomery, New Hanover.

Code, s. 717; 1899, c. 488; 1901, c. 680; 1903, cc. 191, 40, 207, 790; 1876-7, c. 141, s. 5.

1261. Vacancies in board, how filled. In case of a vacancy occurring in the board of commissioners of a county, the clerk of the superior court for the county shall appoint to said office for the unexpired term, except in those counties named in section twelve hundred and sixty-two.

Code, s. 719; 1895, c. 135, s. 7.

1262. Vacancies in board, how filled in certain counties. In case of a vacancy occurring in the board of commissioners of a county the justices of the peace for the county shall appoint to said office for the unexpired term. This section shall apply only to the counties of Washington, Granville, Caswell, Bertie, Vance, Warren, Craven, Franklin, Montgomery, New Hanover.

Code, s. 719; 1899, c. 488; 1901, c. 680; 1903, cc. 40, 207, 191, 790.

1263. When board to qualify; oath to be filed. The board of commissioners shall qualify and enter upon the duties of their office on the first Monday of December next succeeding their election, and they may take the oaths of office before the clerk of the superior court, or some judge, or justice of the peace or other person qualified by law to administer oaths. The oaths of office severally taken and subscribed by them shall be deposited with the clerk of the superior court.

Code, s. 708; 1895, c. 135, s. 4.

III. MEETINGS.

1264. Meetings of the board. The board of commissioners in each county shall hold a regular meeting at the courthouse, on the first Mondays in December and June. Special meetings may be held on the first Monday in every month, but shall not continue longer in session than two days. Meetings may be held at other times for the more convenient dispatch of business at the call of the chairman, on the written request of one member of the board, but public notice of the time and place of all such called meetings shall be posted at the courthouse door for not less than six days, and published one time in a county newspaper, if there is one. The board shall receive no compensation for attending such called meetings. The board may adjourn its regular meetings in December and June from day to day until the business before it is disposed of. Every meeting shall be open to all persons. A majority of the board shall constitute a

quorum. At each regular December meeting the board shall choose one of its members as chairman for the ensuing year; in his absence the members present shall choose a temporary chairman.

Code, s. 706.

NOTE. Meetings in certain counties are governed by special laws as follows: Mecklenburg, 1893, c. 199; Clay, 1889, c. 184; Forsyth, 1897, c. 437; Wake, 1899, c. 297; Durham, 1901, c. 309; Edgecombe, 1901, c. 429; Gaston, 1903, c. 34.

IV. POWERS AND DUTIES.

1265. Powers given board. The board of commissioners of the several counties shall have power—

1. TO EXEMPT FROM CAPITATION TAX.

To exempt from capitation tax in special cases, on account of poverty and infirmity.

2. TO PROVIDE FOR THE PAYMENT OF DEBT.

To provide by taxation or otherwise, for the prompt and regular payment, with interest, of any existing debt owing by any county.

3. TO SUBMIT PROPOSITIONS TO CONTRACT DEBT TO A VOTE OF ELECTORS.

To submit to a vote of the qualified electors in the county, after having obtained the approval of the general assembly, any proposition to contract a debt, or loan the credit of the county, under section seven, article seven, of the constitution; to order the time for voting upon such proposition, which shall be upon public notice thereof at one or more places in each township in the county, and publication in one or more county newspapers, if there be any, for three months next immediately preceding the time fixed on; and such election shall take place and be conducted under the laws as prescribed for the election of members of the general assembly; and the commissioners shall provide for giving effect, in case of the adoption of the proposition, to the expressed will of a majority of the qualified voters in such election.

4. TO MAKE ORDERS RESPECTING CORPORATE PROPERTY.

To make such orders respecting the corporate property of the county as may be deemed expedient.

5. TO AUDIT ACCOUNTS.

To audit accounts against the county, and direct the raising of the moneys necessary to defray them.

6. TO PURCHASE PROPERTY FOR ANY PUBLIC BUILDING, AND AT EXECUTION SALE.

To purchase real property necessary for any public county building, and for the support of the poor; and to determine the site thereof, where it has not been already located; and to purchase land at any execution sale, when it shall be deemed expedient to do so, to secure a debt due the county. The deed shall be made to the county, and the board may, in its discretion, sell any lands so purchased.

7. TO DIVIDE COUNTY INTO TOWNSHIPS.

To divide each county into convenient districts, called townships, and to determine the boundaries, and prescribe the names of said townships. A map and survey of said townships shall be filed in the office of the clerk of the board of commissioners, and also in the office of the secretary of state.

8. TO ORDER THE LAYING OUT, ALTERATION OR DISCONTINUING OF HIGHWAYS.

To exercise authority in laying out, altering, repairing and discontinuing highways; in establishing and settling ferries; in building and keeping up bridges; in laying off or discontinuing cartways; in providing draws in all bridges, where the same may be necessary for the convenient passage of vessels; in appointing overseers of highways; in excusing persons from working on the highways; in allowing and contracting for the building of toll-bridges, and taking bond from the builders thereof; and in licensing the erection of gates across highways. This authority shall be exercised under the rules, regulations, restrictions and penalties in all respects prescribed and imposed in the chapter entitled "Roads, Ferries and Bridges."

9. TO RAISE HIGHWAY MONEYS.

To raise by tax the necessary highway moneys, in such manner as may be prescribed by law.

10. TO APPOINT AN INSPECTOR OF HIGHWAYS AND BRIDGES.

To appoint an inspector of highways and bridges for the county, if deemed necessary; to fix and provide for his compensation and regulate his duties, not inconsistent with the laws of the state. The

commissioners of two or more counties may unite in employing an inspector of highways and bridges, and apportioning his compensation between the respective counties as may be agreed upon.

11. TO PROVIDE FOR THE EMPLOYMENT OF PRISONERS.

To provide for the employment on the highway or public works in the county, of all persons condemned to imprisonment with hard labor, and not sent to the penitentiary.

12. TO APPOINT PROXIES TO REPRESENT COUNTY.

To appoint proxies to represent in any annual or other meeting, the shares or interest held by any county in a railroad company, or other corporation, under the charter of such corporation, or under any special acts of the general assembly, authorizing county subscriptions in such cases.

13. TO SELL OR LEASE REAL PROPERTY.

To sell or lease any real property of the county and to make deeds or leases for the same to any purchaser or lessee.

14. TO PROVIDE FOR THE MAINTENANCE OF THE POOR.

To provide by tax for the maintenance, comfort and well-ordering of the poor; to employ, biennially, by public letting or otherwise, some competent person as overseer of the poor, to institute proceedings by the warrant of the chairman against any person coming into the county who is likely to become chargeable thereto, and cause the removal of such poor person to the county where he was last legally settled; and to recover by action in the superior court from the said county, all the charges and expenses whatever, incurred for the maintenance or removal of such poor person.

15. TO ESTABLISH PUBLIC HOSPITALS.

To establish public hospitals for the county in cases of necessity, and to make rules, regulations and by-laws for preventing the spread of contagious and infectious diseases, and for taking care of those afflicted thereby, the same not being inconsistent with the laws of the state; and to raise by taxation the necessary moneys to defray the charges and expenses so incurred.

16. TO PROCURE WEIGHTS AND MEASURES.

To procure for each county sealed weights and measures, according to the standard prescribed by the congress of the United States;

and to elect a standard keeper, who shall qualify before the board and give bond approved by the board, as prescribed by law.

17. TO APPOINT COMMISSIONERS TO OPEN RIVERS AND CREEKS.

To appoint a commissioner to open and clear the rivers and creeks within the county, or where such river or creek forms a county line or a part thereof. For this purpose the board is authorized to withdraw from the public roads such hands as may be deemed necessary, and allot them to such work under overseers and the direction of the commissioner. The board may impose the duties of this subdivision on the inspector of highways and bridges when appointed; and shall in all respects conduct the opening and clearing of such rivers and creeks as prescribed by law.

18. TO LICENSE PEDDLERS AND RETAILERS OF SPIRITUOUS LIQUORS.

To license peddlers and retailers of spirituous and other liquors as prescribed by law. No license shall be good for more than one year, nor granted to two or more persons to peddle as partners in trade. And the board of commissioners shall grant licenses for the sale of spirituous liquors to all persons possessing the qualifications required by law, except in those localities where the sale of spirituous liquors shall be prohibited by law.

19. TO ESTABLISH PUBLIC LANDINGS, PLACES OF INSPECTION, AND INSPECTORS.

To establish such public landings and places of inspection as the board of commissioners may think proper; and to appoint such inspectors in any town or city as may be authorized by law.

20. TO LICENSE AUCTIONEERS.

To license for the term of one year any number of persons to exercise the trade and business of auctioneers in each county, and to take their bonds as prescribed by law.

21. TO REQUIRE FROM ANY COUNTY OFFICER A REPORT UNDER OATH.

To require from any county officer, or other person employed and paid by the county, a report under oath at any time, on any matters connected with his duties.

22. TO AUTHORIZE CHAIRMAN TO ISSUE SUBPŒNAS.

To authorize the chairman to issue subpœnas to compel the attendance before the board, of persons, and the production of books and papers relating to the affairs of the county for the purpose of

examination, on any matter within the jurisdiction of the board. The subpoena shall be served by the sheriff or any constable to whom it is delivered; and upon return of personal service thereof, whoever neglects to comply with the subpoena or refuses to answer any proper question, shall be guilty of contempt and punishable therefor by the board. A witness is bound in such case to answer all the questions which he would be bound to answer in like case in a court of justice; but his testimony given before the board shall not be used against the witness on the trial of any criminal prosecution other than for perjury committed on the examination; the chairman of the board of county commissioners for each county is authorized in his official capacity to administer oaths in any matter coming before either of such boards. Any member of such board while temporarily acting as such chairman shall have and exercise like authority.

23. TO APPROVE BONDS OF COUNTY OFFICERS AND INDUCT THEM INTO OFFICE.

To qualify and induct into office at the meeting of the board, on the first Monday in the month next succeeding their election or appointment, the following named county officers, to-wit: Clerk of the superior court, sheriff, coroner, treasurer, register of deeds, surveyor, and constable; and to take and approve the official bonds of such officers, which the board shall cause to be registered in the office of the register of deeds. The original bonds shall be deposited with the clerk of the superior court, except the bond of the said clerk, which shall be deposited with the register of deeds, for safe-keeping: Provided, however, that if the said board shall declare the official bonds of any of said county officers to be insufficient, or shall decline to receive the same, the said officers may appeal to the superior court judge riding the district in which said county is, or to the resident judge of said district, as he may elect, who shall hear said appeal in chambers, at any place in said district which he shall designate, within ten days after notice by him of the same, and if, upon the hearing of said appeal, the judge shall be of the opinion that the said bond is sufficient, he shall issue an order to the said board of commissioners to induct the said officer into office, or that he shall be retained in office, as the case may be; but if, upon the hearing of said appeal, the judge shall be of the opinion that the bond is insufficient, he shall give the appellant ten days in which to file before him an additional bond, and if the appellant shall within the said ten days, file before the said judge a good and sufficient bond, in the opinion of said judge, he shall so declare and issue his order to said board directing and requiring them to induct the appellant into office, or retain him as the case

may be; but if, in the opinion of the said judge, both the original and the additional bonds are insufficient, he shall declare the said office vacant and notify the said commissioners, who shall notify the clerk of the superior court, who shall appoint to fill the vacancy, except in cases of the clerk of the superior court, which vacancy shall be filled by the resident judge. The judgment of the superior court judge shall be final. The appeal and the finding and judgment of the superior court judge shall be recorded on the minutes of the board of commissioners.

24. TO ADOPT A COUNTY SEAL.

To adopt a seal for the county, a description and impression whereof shall be filed in the office of superior court clerk and of the secretary of state.

25. TO LEVY COUNTY TAXES.

To levy, in like manner with the state taxes, the necessary taxes for county purposes; but the taxes so levied shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the general assembly. All county taxes shall be levied at the regular meeting of the board on the first Monday in June. The board may extend the time for the collection and settlement of the county taxes to such time as may be deemed expedient, not beyond the first day of May next after the taxes were levied.

26. TO ERECT AND REPAIR COUNTY BUILDINGS.

To erect and repair the necessary county buildings, and to raise, by taxation, the moneys therefor.

27. TO BORROW MONEY.

To borrow money for the necessary expenses of the county, and to provide for its payment, with interest, in yearly installments, by taxation.

28. TO DESIGNATE SITE FOR COUNTY BUILDINGS.

To remove or designate a new site for any county building; but the site of any county building already located shall not be changed, unless by an unanimous vote of all the members of the board at the regular December meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there is one, and posted in one or more public places in every township in the county for three

months, next immediately preceding the annual meeting, at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the general assembly.

29. TO CONSTRUCT AND REPAIR BRIDGES.

To construct and repair bridges in the county, and to raise by tax, the money necessary therefor, and when a bridge is necessary over a stream, which divides one county from another, the board of commissioners of each county shall join in constructing or repairing such bridge; and the charge thereof shall be defrayed by the counties concerned, in proportion to the number of taxable polls in each.

30. TO ERECT, DIVIDE OR ALTER TOWNSHIPS.

To erect, divide, change the names of, or alter townships in the manner following: In any county, any three freeholders of each township to be affected, may, after the notice presently to be mentioned, apply by petition to the board of commissioners, to erect a new township, or divide an existing township, or change the name of or alter the boundaries thereof. Notice of the application shall be posted in one or more public places in each of such townships, and published in a newspaper printed in the county, if there is one, for at least four weeks preceding the meeting at which the application is made to the board. No township shall have or exercise any corporate powers whatsoever, unless authorized by an act of the general assembly, to be exercised under the supervision of the board of commissioners.

31. TO PROVIDE FOR A HOUSE OF CORRECTION.

To make provision for the erection in each county of a house of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed; to regulate the employment of labor therein; to appoint a superintendent thereof, and such assistants as may be deemed necessary, and to fix their compensation.

1266. Powers in certain counties. In the counties of Bertie, Brunswick, Caswell, Craven, Franklin, Granville, Montgomery, Pasquotank, Perquimans, New Hanover, Vance, Warren, and Washington, the powers conferred by subsections twenty-five and twenty-eight of the preceding section shall be exercised only with the concurrence of a majority of the justices of the peace, sitting with them; and the powers conferred by subsections thirteen, twenty-six, twenty-seven, thirty and thirty-one of the preceding section shall be exercised only with the concurrence, or assent of a majority of the justices of the

peace; and the powers conferred in subsection twenty-nine of the preceding section shall not be exercised without the concurrence of the justices of the peace, where the costs exceed five hundred dollars; and in said counties subsection twenty-three of the preceding section shall not be enforced, but the following shall govern, to-wit: To qualify and induct into office at the meeting of the board on the first Monday in the month next succeeding their election or appointment the following-named county officers, to-wit: Clerk of the superior court, sheriff, coroner, treasurer, register of deeds, surveyor and constable; and to take and approve the official bonds of said officers, which the board shall cause to be registered in the office of the register of deeds. The original bonds shall be deposited with the clerk of the superior court, except the bond of the said clerk, which shall be deposited with the register of deeds for safe keeping.

Code, s. 707; 1895, c. 135; 1899, c. 89; 1899, c. 166; 1899, c. 488; 1901, c. 680; 1903, c. 790.

1267. Purchase of county indebtedness. The board of commissioners may purchase at any price, not exceeding their par value and accumulated interest, any of the outstanding bonds or other indebtedness of the county.

Code, s. 718.

1268. To fill vacancies in certain offices. Whenever a vacancy shall occur in the offices of sheriff, constable, coroner, register of deeds, county treasurer or county surveyor, the board of commissioners of the county shall fill the same by appointment.

Code, s. 720.

1269. To settle disputed county lines. Whenever there shall be any dispute concerning the dividing line between counties, the board of commissioners of each county interested in the adjustment of said line, a majority of the board consenting thereto, may appoint one or more commissioners, on the part of each county, to settle and fix the line in dispute; and their report, when ratified by a majority of the commissioners in each county, shall be conclusive of the location of the true line, and shall be recorded in the register's office of each county, and in the office of the secretary of state.

Code, s. 721; R. C., c. 27; 1836, c. 3.

1270. Such commissioners, how sworn and paid. Such commissioners, before entering on the duties assigned them, shall be sworn before a justice of the peace; and they, with all others employed, shall be allowed reasonable pay for their labors.

Code, s. 722.

NOTE. County commissioners failing to discharge duty guilty of misdemeanor, see Crimes.

County commissioners liable for taxes, see s. 2820.

V. CLERK TO BOARD.

1271. Register of deeds ex officio; compensation. The register of deeds shall be ex officio clerk of, and his compensation shall be fixed by, the board of commissioners.

Code, s. 710; 1895, c. 135, s. 4.

1272. Duties. It is the clerk's duty—

1. To record in a book to be provided for the purpose all the proceedings of the board.

2. To enter every resolution or decision concerning the payment of money.

3. To record the vote of each commissioner on any question submitted to the board, if required by any member present.

4. To preserve and file in alphabetical, or other due order, all accounts presented or acted on by the board, and to designate upon every account audited, the amount allowed and the charges for which it was allowed.

5. To keep the books and papers of the board free for the examination of all persons.

Code, s. 712.

1273. To publish annual statement. The clerk shall annually, on or within five days next before the first Monday of December, make out and certify, and cause to be posted at the courthouse, and published in a newspaper printed in the county, if there be one, for at least four weeks, a statement for the preceding year, showing—

1. The amount, items and nature of all compensation audited by the board to the members thereof severally.

2. The number of days the board was in session, and the distance traveled by the members respectively in attending the same.

3. Whether any unverified accounts were audited, and if any, how much and for what.

Code, s. 713.

NOTE. Failure to publish statement a misdemeanor, see Crimes.

For record to be kept of accounts of funds by clerk of superior court, see s. 872.

For courthouse, see County Prison.

For limit on county and other municipal indebtedness, see Towns.

VI. COUNTY POOR.

1274. County commissioners to provide for support of; superintendent. The board of commissioners of each county is authorized to provide by taxation for the maintenance, and to do all such matters and things as may be deemed expedient for the comfort and

well ordering, of the poor; to employ biennially some competent person as superintendent of the county home for the aged and infirm, with power to remove him for cause; to institute proceedings against any person coming into the county who is likely to become chargeable thereto, and to cause the removal of such person to the county where he was last legally settled; and to recover by action from such county, all charges and expenses whatever incurred for the maintenance or removal of such poor person.

Code, s. 3540; 1891, c. 138.

1275. County home for aged and infirm. All persons who may become chargeable to any county shall be maintained at the county home for the aged and infirm, or at such place or places as the board of commissioners may select or agree upon.

Code, s. 3541; 1891, c. 138.

1276. How county home supported. The board of commissioners may provide for the support of the persons admitted by them to the home for the aged and infirm by employing a superintendent at a certain sum, or by paying a specified sum for the support of such persons to any one who will take charge of the county home for the aged and infirm as said board may deem for the best interest of the county and the cause of humanity.

Code, s. 3543; 1876-7, c. 277, s. 3.

1277. Indigent persons owning property. Whenever any indigent person becomes chargeable to a county for maintenance and support in accordance with the provisions of this chapter, owning any estate, it shall be the duty of the board of commissioners of any county liable to pay the expenses of such indigent person, to cause the same to be sold for its indemnity or reimbursement in the manner provided in the chapter entitled Idiots, Inebriates and Lunatics, or they may take possession thereof and rent the same out and apply the rent toward the support of such indigent person.

Code, s. 3547; 1866, c. 49.

1278. Families of militiamen supported by county. When any citizen of the state is absent on service as a militiaman or member of the state guard, and his family are unable to support themselves during his absence, the board of commissioners of his county, on application, shall make towards their maintenance such allowance as may be deemed reasonable.

Code, s. 3546; R. C., c. 86, s. 14; 1779, c. 152.

1279. Paupers not to be hired out by auction. No pauper shall be let out at public auction, but the board of commissioners may make such arrangements for the support of paupers with their

friends or other persons, when not maintained at the county home for the aged and infirm as may be deemed best.

Code, s. 3542; 1876-7, c. 277, s. 2.

1280. Legal settlements, how acquired. Legal settlements may be acquired in any county, so as to entitle the party to be supported by such county in the manner following, and not otherwise:

1. BY ONE YEAR'S RESIDENCE.

Every person, who shall have resided continuously in any county for one year, shall be deemed legally settled in that county.

2. MARRIED WOMEN TO HAVE SETTLEMENT OF THEIR HUSBANDS.

A married woman shall always follow and have the settlement of her husband, if he have any in the state; otherwise, her own at the time of her marriage, if she then had any, shall not be lost or suspended by the marriage, but shall be that of her husband, till another is acquired by him, which shall then be the settlement of both.

3. LEGITIMATE CHILDREN TO HAVE SETTLEMENT OF FATHER.

Legitimate children shall follow and have the settlement of their father, if he have any in the state, until they gain a settlement of their own; but if he have none, they shall, in like manner, follow and have the settlement of their mother, if she have any.

4. ILLEGITIMATE CHILDREN, THAT OF THEIR MOTHER.

Illegitimate children shall follow and have the settlement of their mother, at the time of their birth, if she then have any in the state. But neither legitimate nor illegitimate children shall gain a settlement by birth in the county in which they may be born, if neither of their parents had any settlement therein.

5. SETTLEMENT TO CONTINUE UNTIL NEW ONE ACQUIRED.

Every legal settlement shall continue till it shall be lost or defeated by acquiring a new one, within or without the state; and upon acquiring such new settlement, all former settlements shall be defeated and lost.

Code, s. 3544; R. C., c. 86, s. 12; 1777, c. 117, s. 16.

1281. Removed to proper county, at cost of that county; house-keepers entertaining poor. Upon complaint made by the chairman of the board of county commissioners, before a justice of the peace, that any person has come into the county, who is likely to become

chargeable thereto, the justice by his warrant shall cause such poor person to be removed to the county where he was last legally settled; but if such poor person be sick or disabled, and can not be removed without danger of life, the board of commissioners shall provide for his maintenance and cure at the charge of the county; and after his recovery shall cause him to be removed, and pay the charges of his removal; and the county, wherein he was last legally settled, shall repay all charges occasioned by his sickness, maintenance, cure, and removal, and all charges and expenses whatever, if such person shall die before removal. And if the board of commissioners of the county, to which such poor person belongs, shall refuse to receive and provide for him when removed as aforesaid, every commissioner so refusing shall forfeit and pay forty dollars, for the use of the county whence the removal was made; moreover, if the board of commissioners of the county, where such person was legally settled, shall refuse to pay the charges and expenses aforesaid, they shall be liable for the same; and if any housekeeper shall entertain such poor person, and shall not give notice thereof to the board of commissioners of his county, or one of them, within one month, the person so offending shall forfeit and pay ten dollars.

Code, s. 3545; R. C., c. 86, s. 13; 1777, c. 117, s. 17; 1834, c. 21.

CHAPTER 23.

COUNTY PRISONS.

| | Sections. |
|-----------------------------------|-----------|
| I. Jails, | 1282—1288 |
| II. Prisoners kept and cared for, | 1289—1295 |
| III. Of adjoining county used, | 1296—1298 |
| IV. Farming out prisoners, | 1299—1301 |
| V. Convicts on public roads, | 1302—1306 |
| VI. Houses of correction, | 1307—1319 |
| VII. Joint houses of correction, | 1320—1322 |

I. JAILS.

1282. Built and repaired by commissioners. There shall be kept and maintained in good and sufficient repair in every county, a courthouse and common jail, at the expense of the county, wherein the same are situated; and the boards of commissioners of the several counties respectively shall lay and collect taxes, from year to year, as long as may be necessary, for the purpose of building,

repairing and furnishing their several courthouses and jails, in such manner as they shall think proper; and from time to time shall order and establish such rules and regulations for the preservation of the courthouse, and for the government and management of the prisons, as may be conducive to the interests of the public, and the security and comfort of the persons confined.

Code, s. 782; R. C., c. 30, s. 1; 1741, c. 33, ss. 1, 2; 1795, c. 433, s. 1; 1816, c. 911, s. 1.

1283. Five apartments. The common jails of the several counties shall be provided with at least five separate and suitable apartments, one for the confinement of white male criminals; one for white female criminals; one for colored male criminals; one for colored female criminals; and one for other prisoners.

Code, s. 783; R. C., c. 30, s. 2; 1795, c. 433, s. 4; 1816, c. 911.

Note. Misdemeanor to confine prisoners in improper apartments, see Crimes.

1284. Heated. It shall be the duty of the board of commissioners in every county to have the common jails so heated by furnaces, stoves, or otherwise, as to render them warm and comfortable.

Code, s. 784; 1879, c. 25.

Note. Commissioners liable to indictment for failure to heat, see Crimes.

1285. Bedding furnished. The board of county commissioners, from time to time, as may be necessary, shall order the sheriff of the county to purchase, for the use of their jail, a certain number of good warm blankets or other suitable bedclothing, which shall be securely preserved by the jailer, and furnished to the prisoners for their use and comfort, as the season or other circumstances may require; and the sheriff, at least once in every year, shall report to the board of commissioners the condition and number of such blankets and bedclothing.

Code, s. 3465; R. C., c. 87, s. 10; 1822, c. 1136.

1286. Prison bounds. For the preservation of the health of such persons as shall be committed to jail, the board of commissioners of each county shall mark out such a parcel of the land as they shall think fit, not exceeding six acres, adjoining the prison, for the rules thereof; and every prisoner not committed for treason or felony, giving bond with good security to the sheriff of the county to keep within the rules, shall have liberty to walk therein, out of the prison, for the preservation of his health; and on keeping continually within the said rules, shall be deemed to be in law a true prisoner; and that every person may know the true bounds of said rules, they shall be recorded in the county records, and the marks thereof shall be renewed as occasion may require.

Code, s. 3466; R. C., c. 87, s. 11; 1741, c. 33, s. 3.

1287. Bonds returned to court. Every bond taken of any person confined for an offense, or otherwise than on process issuing in a civil case, shall be returned to the court by whose order or process such person is confined, or which may be entitled to cognizance of the matter, and shall be of the force and effect of a recognizance; and on breach thereof shall be forfeited, and shall be collected as a forfeiture, in the name and for the use of the state, and applied as other forfeited recognizances.

Code, s. 3467; R. C., c. 87, s. 12.

1288. Bond on *capias* in civil action. Every bond given by any person committed in arrest and bail, or in custody after final judgment, shall be assigned by the sheriff to the party at whose instance such person was committed to jail, and shall be returned to the office of the clerk of the court where the judgment was rendered, and shall have the force of a judgment; and if any person, who shall obtain the rules of any prison, as aforesaid, shall escape out of the same, before he shall have paid the debt or damages and costs according to the condition of his bond, the court where the bond is filed, upon motion of the assignee thereof, shall award execution against such person and his sureties for the debt or damages and costs, with interest from the time of escape till payment; and no person committed to jail on such execution shall be allowed the rules of prison: Provided, the obligors have ten days' previous notice of such motion, in writing; but they shall not be admitted to deny the making of the bond in their answer, unless by affidavit they prove the truth of the plea.

Code, s. 3469; R. C., c. 87, s. 14; 1759, c. 65, ss. 2, 3.

II. PRISONERS KEPT AND CARED FOR.

1289. United States prisoners kept. When a prisoner shall be delivered to the keeper of any jail by the authority of the United States, such keeper shall receive the prisoner, and commit him accordingly; and every keeper of a jail refusing or neglecting to take possession of a prisoner delivered to him by the authority aforesaid, shall be subject to the same pains and penalties as for neglect or refusal to commit any prisoner delivered to him under the authority of the state. And the allowance for the maintenance of any prisoner committed as aforesaid shall be equal to that made for prisoners committed under the authority of the state.

Code, s. 3456; R. C., c. 87, s. 1; 1790, c. 322, ss. 1, 2.

1290. Jailer to cleanse jail, furnish food and water. The sheriff or keeper of any jail shall, every day, cleanse the room of the prison in which any prisoner shall be confined, and cause all filth to be

removed therefrom; and shall also furnish the prisoner plenty of good and wholesome water, three times in every day; and shall furnish each prisoner fuel, not less than one pound of wholesome bread, one pound of good roasted or boiled flesh, and every necessary attendance.

Code, s. 3464; R. C., c. 87, s. 9; 1816, c. 911, s. 2.

1291. May purchase necessities. Prisoners shall be allowed to purchase and procure such necessities, in addition to the diet furnished by the jailer, as they may think proper; and to provide their own bedding, linen and clothing, without paying any perquisite to the jailer for such indulgence.

Code, s. 3463; R. C., c. 87, s. 8; 1795, c. 433, s. 6.

Note. Jailer injuring prisoner liable for treble damages and guilty of misdemeanor, see Crimes.

1292. Escape apprehended, guard; compensation. Whenever the sheriff of the county, or keeper of the jail, shall apprehend that there is danger of a prisoner escaping, through the insufficiency of the jail or other cause, it shall be his duty, without delay, to make information thereof to a judge of the superior court, the attorney general, or a solicitor, if any of those officers be in the county, and if not, then to three justices of the peace, and they are authorized, if they deem it advisable, to furnish the sheriff or keeper of the jail with an order in writing, addressed to the commanding officer of the militia of the county, setting forth the danger, and requiring him forthwith to furnish such guard as to him may appear to be suitable for the occasion. For which service the persons ordered on guard shall receive such compensation as militiamen in actual service for defense of the state; and on application for pay, the letter to the commanding officer, on which the guard was ordered, and the certificate of such officer, countersigned by the sheriff or jailer, together with the deposition of the officer of the guard, stating the time of service, and that it was faithfully performed, shall be sufficient to authorize the payment of the same.

Code, s. 3460; R. C., c. 87, s. 5; 1795, c. 433, s. 8.

1293. Prisoners to pay charges. Every person committed by lawful authority, for any criminal offense or misdemeanor, shall bear all reasonable charges for guarding and carrying him to jail, and also for his support therein until released; and all the estate which such person possessed at the time of committing the offense shall be subjected to the payment of such charges and other prison fees, in preference to all other debts and demands; and if there be no visible estate whereon to levy such fees and charges, the amount shall be paid by the county.

Code, s. 3461; R. C., c. 87, s. 6; 1795, c. 433, s. 7.

1294. Guarding and removing, by what county paid. The expense for guarding prisons shall be paid by the county wherein the prison is situated; and for conveying prisoners, as also the expense attending such prisoners while in jail, when the same may be chargeable on the county, shall be paid by the county from which the prisoner is removed.

Code, s. 3462; R. C., c. 87, s. 7; 1808, c. 757, s. 2.

1295. Transferred to successor by indenture. The delivery of prisoners, by indenture between the late and present sheriff, or the entering on record in court the names of the several prisoners, and the causes of their commitment, delivered over to the present sheriff, shall be sufficient to discharge the late sheriff from all liability for any escape that shall happen.

Code, s. 3470; R. C., c. 87, s. 15; 1777, c. 118, s. 12.

III. OF ADJOINING COUNTY USED.

1296. By ministerial officers, when. The sheriffs, constables, and other ministerial officers of any county, in which there may be no jail, shall have authority to confine any prisoner arrested on process, civil or criminal, and held in custody for want of bail, in the jail of any adjoining county, until bail be given or tendered. And any sheriff or jailer having a prisoner in his custody, by virtue of any mode of commitment provided in this chapter, shall be liable, civilly and criminally, for his escape, in the same manner as if such prisoner had been confined in the prison of his proper county.

Code, s. 3459; R. C., c. 87, s. 4; 1835, c. 2, s. 3.

1297. When no jail, or jail unsafe. Whenever it shall happen that there shall be no jail, or an unfit or insecure jail, in any county, the superior court judges, justices of the peace, and all judicial officers of such county may commit all persons who may be brought before them, whether in a criminal or civil proceeding, to the jail of any adjoining county, for the same causes, and under the like regulations that they might have ordered commitments to the usual jail; and the sheriffs, constables, and other officers of such county, in which there may be no jail, or an unfit one, and the sheriffs or keepers of the jails of the adjoining counties, shall obey any order of commitment so made.

Code, s. 3458; R. C., c. 87, s. 3; 1835, c. 2, s. 2.

Note. Failure to obey order of commitment a misdemeanor, see Crimes.

1298. When jail destroyed. Whenever the jail of any county shall be destroyed by fire or other accident, any justice of the peace of such county may cause all prisoners who may then be confined therein to be brought before him; and upon the production of the

process, under which any prisoner was confined, shall order his commitment to the jail of any adjacent county; and the sheriff, constable or other officer of the county, deputed for that purpose, shall obey the order; and the sheriff or keeper of the common jail of such adjacent county shall receive such prisoners upon the order aforesaid.

Code, s. 3457; R. C., c. 87, s. 2; 1835, c. 2, s. 1.

NOTE. Failure to receive prisoner a misdemeanor, see Crimes.

IV. FARMING OUT PRISONERS.

1299. Counties and towns may. The boards of commissioners of the several counties, within their respective jurisdictions, or such other county authorities therein as may be established, and the mayor and intendant of the several cities and towns of the state, shall have power to provide under such rules and regulations as they may deem best for the employment on the public streets, public highways, public works, or other labor for individuals or corporations, of all persons imprisoned in the jails of their respective counties, cities and towns, upon conviction of any crime or misdemeanor, or who may be committed to jail for failure to enter into bond for keeping the peace or for good behavior, and who fail to pay all the costs which they are adjudged to pay, or to give good and sufficient security therefor: Provided, such prisoner or convict shall not be detained beyond the time fixed by the judgment of the court: Provided further, the amount realized from hiring out such persons shall be credited to them for the fine and bill of costs in all cases of conviction: Provided also, it shall not be lawful to farm out any such convicted person who may be imprisoned for the nonpayment of a fine, or as punishment imposed for the offense of which he may have been convicted, unless the court before whom the trial is had shall in its judgment so authorize.

Code, s. 3448; 1866-7, c. 30; 1872-3, c. 174, s. 10; 1874-5, c. 113; 1876-7, c. 196, s. 1; 1879, c. 218.

1300. Party hiring may prevent escape. The party in whose service said convicts may be, may use the necessary means to hold and keep them in custody, and to prevent their escape.

Code, s. 3454; 1876-7, c. 196, s. 3.

1301. Sheriff has control. All convicts hired or farmed out by the county or other municipal authorities shall at all times be under the supervision and control, as to their government and discipline, of the sheriff, or his deputy, of the county in which they were convicted and imprisoned, and the sheriff, or his deputy, shall be deemed a state officer for the purpose of this section.

Code, s. 3453; 1876-7, c. 196, s. 2.

V. CONVICTS ON PUBLIC ROADS.

1302. What convicts so sentenced. When any county has made provision for the working of convicts upon the public roads, or when any number of counties have jointly made provision for working convicts upon the public roads, it shall be lawful for, and the duty of the judge holding court in such counties, to sentence to imprisonment at hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jail or in the state prison, the following classes of convicts: First, all persons convicted of offenses the punishment whereof would otherwise be wholly, or in part, imprisonment in the common jail; second, all persons convicted of crimes the punishment whereof would otherwise wholly or in part be imprisonment in the penitentiary for a term not exceeding ten years. In such counties there may also be worked on the public roads, in like manner, all persons sentenced to imprisonment in jail by any magistrate, and also all insolvents who shall be imprisoned by any court in said counties for nonpayment of costs in criminal causes may be retained in imprisonment and worked on the public roads until they shall have repaid the county to the extent of the half fees charged up against the county for each person taking the insolvent oath. The rate of compensation to be allowed each insolvent for work on the public roads shall be fixed by the county commissioners at a just and fair compensation, regard being had to the amount of work of which each insolvent is capable.

1887, c. 355; 1889, c. 419.

1303. Under control of county authorities. The convicts sentenced to hard labor upon the public roads, under the provisions of the preceding section, shall be under the control of the county authorities, and the county authorities shall have power to enact all needful rules and regulations for the successful working of convicts upon the public roads: Provided, the county commissioners shall have power to work such convicts on the public roads or in canaling the main drains and swamps or on other public work of the county.

1887, c. 355, s. 2; 1891, c. 164.

1304. When sentenced to state's prison. In all cases where the judge presiding shall be satisfied that there is good reason to fear that an attempt might be made to release or to injure any person convicted of any of the offenses mentioned in the second class, it shall be lawful for the judge to sentence such convicts to imprisonment in the penitentiary, as is now provided by law: Provided, that no person who has been convicted and sentenced on a charge of

murder, manslaughter, rape, attempt to commit rape, or arson, shall be assigned to county roads under this chapter.

1887, c. 355, s. 4.

1305. When state's prison to send convicts to county. In addition to the convicts mentioned in section first of this subchapter, the board of directors of the state's prison is authorized and directed to furnish to the authorities of any county within the state, convicts, not exceeding twenty-five in number during any one year for the purpose of working the public roads in said county. The said convicts shall be at all times under the supervision and control as to their government and discipline of the board of directors of the state's prison as in case of hiring convicts to railroad companies. Any county applying for convicts under this chapter shall erect suitable stockades for their safe-keeping and protection, and shall pay the expense of their transportation from and to the state's prison.

1887, c. 355, s. 5.

1306. Taxes levied to maintain. The board of county commissioners of the several counties in the state taking advantage of this chapter shall levy a special tax annually as other taxes are levied for the purpose of paying the expenses of said convicts, building of stockades, etc., and the expenses shall be paid by the counties taking advantage of this subchapter.

1887, c. 355, s. 6.

VI. HOUSES OF CORRECTION.

1307. Commissioners may establish. The board of commissioners may, when they deem it necessary, establish within their respective counties, one or more convenient houses of correction, with work shops and other suitable buildings for the safe keeping, correcting, governing, and employing of offenders legally committed thereto. They may also, to that end, procure machinery and material suitable for such employment in said houses, or on the premises; and moreover attach thereto a farm or farms; and all lands purchased for the purposes aforesaid, shall vest in the directors hereinafter provided for, and their successors in office. The said board shall also have power to make, from time to time, such rules and regulations as it may deem proper, for the kind and mode of labor, and the general management of the said houses.

Code, s. 786; 1866, c. 35, s. 1.

1308. Taxes may be levied. The board of commissioners, in addition to the ordinary county taxes, shall also, at the time said taxes are laid, lay such tax as may be necessary to carry into effect this subchapter, which shall be collected and paid to the manager at

the same time as other county taxes are to be paid; for which, and such other funds as may come into his hands as manager, he shall be accountable; and he shall disburse the same under the authority of the directors.

Code, s. 790; 1866, c. 35, s. 5.

1309. Bonds may be issued. The board of commissioners may, if deemed advisable by them, issue county bonds to raise money to establish the houses and farms herein provided for.

Code, s. 796; 1866, c. 35, s. 11.

1310. Governor notified of establishment of. Whenever any work house or house of correction shall be established in pursuance of this chapter, it shall be the duty of the chairman of the board of commissioners of the county wherein the same shall be established, to certify the fact to the governor, who shall cause it to be noted in a book kept for that purpose.

Code, s. 797; 1866, c. 35, s. 12.

1311. Directors appointed; duties. The board of commissioners shall, annually, appoint not less than five nor more than nine directors for each house of correction which may be established, whose duty it shall be to superintend and direct the manager hereinafter named in the discharge of his duties; to visit said houses at least once in every three months; to see that the laws, rules and regulations relating thereto are duly executed and enforced, and that the persons committed to his charge are properly cared for, and not abused or oppressed. The directors shall keep a journal of their proceedings, and publish annually an account of the receipts and expenditures. They shall further make a quarterly report to their respective county commissioners of the general condition of their charge, and of the receipts and expenditures of the institution. They shall also make such by-laws and regulations for the government thereof as shall be necessary, which shall be reported to, and approved by, the said commissioners: The directors shall be paid for the services rendered by the county treasurer, each director first making it appear to the satisfaction of the board of county commissioners, by his oath, the character and extent of the services rendered for which he claims compensation; and such payment shall be made by the county treasurer out of any funds in his hands not otherwise appropriated.

Code, s. 787; 1866, c. 35, s. 2.

1312. Term of office of directors. The directors shall continue in office until others shall be appointed; and if any vacancy happens among them, it shall be filled by the residue of the directors.

Code, s. 795; 1866, c. 35, s. 10.

1313. Manager appointed; bond given. The board of commissioners shall appoint a manager for each house or establishment, who shall give a bond, with two or more solvent sureties, in such sum as may be required, payable to the state of North Carolina, conditioned for the faithful discharge of his duties. He shall hold his office during the pleasure of the board, and be at all times under the supervision of the directors; and in case of his misconduct, of which they shall be the sole judges, he may be forthwith removed by them and a successor appointed, who shall discharge the duties of the office until another manager shall be appointed by the board of commissioners. It shall be the duty of the manager to receive all persons sent to the house of correction, to keep them during the time of their sentence, and to employ and control them according to the rules and regulations established therefor. He shall have the direction and control over the subordinate officers, assistants and servants, who may be appointed by the directors. He shall make monthly reports to the directors of his management of the institution and his receipts and expenditures.

Code, s. 788; 1866, c. 35, s. 3.

1314. Manager to assign employment. The manager shall assign to each person sent to the work house the kind of work in which such person is to be employed.

Code, s. 794; 1866, c. 35, s. 9.

1315. Compensation of officers. The said board of commissioners shall direct what compensation the manager and such subordinate officers, assistants and servants, as shall be appointed, shall receive, and shall provide the payment thereof.

Code, s. 789; 1866, c. 35, s. 4.

1316. Sheriff to convey persons committed. Whenever any person shall be sentenced to a work house, he shall forthwith be committed by the court to the custody of the sheriff, to whom the clerk shall immediately furnish a certified copy of the sentence, in which it shall be stated (if the fact be so) that the offender is committed as a vagrant. The sheriff shall convey the offender to the work house, and deliver him to the manager with the certified copy aforesaid, and take the manager's receipt for the body; which receipt the sheriff shall return to the clerk of the board of commissioners; with his indorsement of the times when the offender was committed to him and delivered to the manager, and the clerk shall record the same in a book kept for that purpose, and file the original with the papers in the case.

Code, s. 793; 1866, c. 35, s. 8.

1317. Absconding offenders punished. If any offender shall abscond, escape or depart from any house of correction without license, the manager shall have power to pursue, retake and bring him back, and to require all necessary aid for that purpose; and when brought back, the manager may confine him to his work by fetters or shackles, or in such manner as he may judge necessary, or may put him in close confinement in the county jail or elsewhere, until he shall submit to the regulations of the house of correction; and for every escape each offender shall be held to labor in the house of correction for the term of one month in addition to the time for which he was first committed.

Code, s. 791; 1866, c. 35, s. 6.

1318. Vagrants may be released, when. If any person committed as a vagrant shall behave well and reform, he may, on the certificate of the manager, be released by the directors. But if otherwise committed, he may be released by the committing authority, upon the certificate of the manager and directors, upon such conditions as they may deem proper.

Code, s. 792; 1866, c. 35, s. 7.

1319. Suits in name of county. All suits brought on behalf of the institution shall, unless it be otherwise prescribed, be brought in the name of the county, to the use of the directors of the work house, without designating such directors by name.

Code, s. 798; 1866, c. 35, s. 13.

VII. JOINT HOUSES OF CORRECTION.

1320. Two or more may join. Any two or more counties, acting through their respective boards of commissioners, may jointly establish one or more convenient houses of correction, as is provided in the preceding sections, for the joint use of the counties so agreeing together; and the same may be established at such place or places, and be in all respects managed under such by-laws, rules and regulations as a majority of the general board of directors, to be appointed as hereinafter directed, shall determine.

Code, s. 799; 1866-7, c. 130, s. 1.

1321. Board of directors appointed. The board of commissioners of each of the respective counties agreeing as aforesaid to the establishment of one or more houses of correction for use jointly with any other county or counties shall annually appoint five directors in behalf of their several counties, and the directors so appointed by each of such counties shall together constitute the general board of directors of any such joint establishment.

Code, s. 800; 1866-7, c. 130, s. 2.

1322. General managers appointed. Said general board of directors shall appoint a manager or superintendent for every such joint establishment, and such assistants and servants as they may deem necessary. The manager shall give bond with two or more able sureties, to be approved by said board, in such sum as may be required, payable to the state of North Carolina, and conditioned for the faithful performance of his duties. He shall hold his office during the pleasure of the general board of directors, and be, at all times, under their supervision; and of his misconduct they shall be the sole judges, and they may at any time remove him. He shall perform all such duties as may be prescribed by such general board of directors, and all such as may be incident to the office of manager by virtue of this chapter. The compensation of the manager and such subordinate officers, assistants and servants, as may be appointed by the general board, shall be fixed by said general board.

Code, s. 801; 1866-7, c. 130, s. 3.

CHAPTER 24.

COUNTY REVENUE.

| | Sections. |
|--------------------------|-----------|
| I. Taxes and fines, | 1323—1326 |
| II. Reports of officers, | 1327—1330 |
| III. Claims, | 1331—1335 |
| IV. Finance committee, | 1336—1340 |

I. TAXES AND FINES.

1323. Taxes collected by sheriff. The county taxes shall be collected by the sheriff of the county, who shall be entitled to the same commissions and be subject to the same rules and regulations in respect to his settlement of the said taxes with the county treasurer as he is in his settlement of the public taxes with the treasurer of the state; and he shall also settle with the county treasurer or board of commissioners for the taxes on the unlisted property in his county, under the same rules and regulations as he accounts with the auditor of the state.

Code, s. 723; R. C., c. 28, s. 2; 1798, c. 509, s. 2; 1811, c. 823.

1324. Statement of fines kept by clerk. It shall be the duty of the clerks of the several courts, and of the several justices of the

peace, to enter in a book, to be supplied by the county, an itemized and detailed statement of the respective amounts received by them in the way of fines, penalties, amercements and forfeitures, and said books shall at all times be open to the inspection of the public.

Code, s. 725; 1873-4, c. 116, s. 4; 1879, c. 96, s. 1.

1325. Fines paid treasurer, when; for schools. All fines, forfeitures, penalties and amercements collected in the several counties by any court or otherwise, shall be accounted for and paid to the county treasurer by the officials receiving them within sixty days after receipt thereof, and shall be faithfully appropriated by the board of commissioners for the establishment and maintenance of free public schools; and the amounts collected in each county shall be annually reported to the superintendent of public instruction on or before the first Monday in January, by the board of commissioners.

Const., Art. IX, s. 5; Code, ss. 724, 726; R. C., c. 28, s. 3; 1879, c. 96, ss. 2, 5.

1326. Commissioners expend county funds. The board of commissioners is invested with full power to direct the application of all moneys arising by virtue of this chapter for the purposes herein mentioned, and to any other good and necessary purpose for the use of the county.

Code, s. 753; R. C., c. 28, s. 16; 1777, c. 129, s. 4.

II. REPORTS OF OFFICERS.

1327. Made annually. Sheriffs, treasurers, clerks of any court, registers of deeds and all other officers of the several counties, into whose hands any public funds may come by virtue or under color of their office, shall make an annual account and report of the amount and management of the same, on the first Monday of December, or oftener if required, in each year, to the board of commissioners. Such report shall give an itemized and detailed account of the public funds received and disbursed, the amount, date and source from which it was received, and the amount, date and person to whom paid; shall be addressed to the chairman of the board of commissioners for the county, and shall be subscribed and verified by the oath of the party making the same, before any person authorized to administer oaths.

Code, s. 728; 1874-5, c. 151, s. 1; 1876-7, c. 276, s. 1.

1328. Compelled. If any person required to make any of the reports hereinbefore provided for shall fail to do so, or if, after a report has been made, the board of commissioners shall disapprove the same, such board may take such legal steps to compel a proper report

to be made, either by suit on the bond of such officer failing to comply or otherwise, as said board may deem best.

Code, s. 730; 1874-5, c. 151, s. 3; 1876-7, c. 276, s. 3.

1329. Registered. The board of commissioners, if it shall approve of any of the said reports, shall cause the same to be registered in the office of the register of deeds in a book to be furnished to the register of deeds by the county, which book shall be marked and styled "Record of Official Reports," with a proper index of all reports recorded therein, and each official report shall, if approved, be indorsed by the chairman of the board with the word "approved," with the date of approval, and when recorded by the register of deeds he shall indorse thereon the date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office.

Code, s. 729; 1874-5, c. 151, s. 2; 1876-7, c. 276, s. 2.

1330. Penalty for failure to make. If any clerk, sheriff, justice of the peace, or other officer, shall fail or neglect to account for and pay over as required by law any taxes on suits, or any fines, forfeitures and amercements as required by this chapter, or shall fail to make the returns herein specified, he shall forfeit and pay five hundred dollars, to be recovered in the name of the board of commissioners for the use of the public schools of the county.

Code, s. 764; R. C., c. 28, s. 7; 1808, c. 750; 1809, c. 769; 1813, c. 864; 1830, c. 1, ss. 11, 12, 13.

III. CLAIMS.

1331. Demand before suit. No person shall sue any city, county, town, or other municipal corporation for any debt or demand whatsoever unless the claimant shall have made a demand upon the proper municipal authorities. And every such action shall be dismissed unless the complaint shall be verified and contain the following allegations: (1) That the claimant presented his claim to the lawful municipal authorities to be audited and allowed, and that they had neglected to act upon it, or had disallowed it; or (2) that he had presented to the treasurer of said municipal corporation the claim sued on, which had been so allowed and audited, and that such treasurer had notwithstanding neglected to pay it.

Code, s. 757.

Note. For time in which such demand and action shall be brought, see s. 358.

1332. Itemized and verified. No account shall be audited by the board for any services or disbursements, unless it is first made out in items and has attached to and filed with it the affidavit of the claimant that the services therein charged have been in fact made and rendered, and that no part thereof has been paid or satisfied.

Each account shall state the nature of the services, and where no specific compensation is provided by law, it shall also state the time necessarily devoted to the performance thereof. The board may disallow or require further evidence of the account, notwithstanding the verification.

Code, s. 754; 1868, c. 20, s. 10.

1333. Numbered as presented. All accounts presented in any year, beginning at each regular meeting in December, shall be numbered from one upwards, in the order in which they are presented, and the time of presentation, the names of the persons in whose favor they are made out, and by whom presented, and shall be carefully entered on the minutes of the board; and no such account shall be withdrawn from the custody of the board or its clerk, except to be used as evidence in a judicial proceeding, and after being so used it shall be promptly returned.

Code, s. 755; 1868, c. 20, s. 12.

1334. Numbered as allowed, when. The clerk of the board of commissioners, if so ordered by the board, shall number all claims, orders and certificates that may be allowed by the board in a book kept for that purpose, and he shall annually, the day before the board proceeds to lay a county tax for the ensuing year, furnish the chairman of the board with a copy of the same.

Code, s. 751; R. C., c. 28, s. 12; 1793, c. 387.

1335. Annual statement published. The board shall cause to be posted at the courthouse within five days after each regular December meeting and for at least four successive weeks, the name of every individual whose account has been audited, the amount claimed and the amount allowed; and also at the same time and in the same manner post a full statement of county revenue and charges, showing by items the income from every source and the disbursements on every account for the past year, together with the permanent debt of the county, if any, when contracted, and the interest paid or remaining unpaid thereon. The board shall also publish the said statement in some newspaper in the county: Provided, the cost of such publication shall not exceed one-half of a cent a word.

Code, s. 752; 1901, c. 196.

IV. FINANCE COMMITTEE.

1336. Election and duties. The board of commissioners may elect by ballot three discreet, intelligent tax-paying citizens, to be known as the "finance committee," whose duty it shall be to inquire into, investigate and report by public advertisement, at the courthouse and one public place in each township of the county, or in a

newspaper, at their option, if one be published in the county, a detailed and itemized account of the condition of the county finances, together with any other information appertaining to any funds, misappropriation of county funds, or any malfeasance in office by any county officers.

Code, s. 758; 1897, c. 513; R. C., c. 28, s. 17; 1838, c. 31, s. 1; 1871-2, c. 71, s. 1.

1337. Oath. The members of the finance committee before entering upon their duties shall, before the clerk of the superior court, subscribe to the following oath or affirmation:

"I, A. B., do solemnly swear (or affirm) that I will diligently inquire into all matters relating to the receipts and disbursements of county funds and a true report make, without partiality. So help me, God."

Code, s. 762; 1871-2, c. 74, s. 4.

1338. Powers of. The finance committee shall have power and authority to send for persons and papers, and to administer oaths; and any person failing to obey their summons, or to produce promptly any paper relating or supposed to relate to any matter appertaining to the duties of the finance committee, shall be guilty of a misdemeanor, and on conviction in the superior court, shall be fined and imprisoned at the discretion of the court.

Code, s. 759; 1831, c. 31, s. 3; 1871-2, c. 71, s. 2; R. C., c. 28, s. 9; 1833, c. 252.

1339. Penalty on officer failing to settle. If any clerk, sheriff, constable, county treasurer, register of deeds, justice of the peace, or other officer or commissioner, who may hold any county money, shall fail duly to account for the same, the finance committee shall give such person ten days' previous notice, in writing, of the time and place at which they will attend to make a settlement; and every officer receiving notice and failing to make settlement as required by this chapter, shall forfeit the sum of five hundred dollars, to be sued for in the name of the state and prosecuted for the use and at the expense of the county, unless the court shall release the officers from the forfeiture.

Code, s. 760; R. C., c. 28, s. 19; 1831, c. 31, s. 3.

1340. Statement by, published. It shall be the duty of the finance committee to make and publish their report as hereinbefore directed on or before the first Monday of December in each year.

Code, s. 761; 1871-2, c. 71, s. 3.

NOTE. For criminal costs for which county is liable, see Costs.
 For penalty on failure to comply with this chapter, see Crimes.
 For general revenue act, see Vol. II, Revenue.
 For limit on municipal indebtedness, see Towns.
 For statute of limitations in claim against county, see s. 358.

CHAPTER 25.

COUNTY TREASURER.

(Sections 1341—1357.)

1341. When elected. In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the general assembly, * * * a treasurer.

Const., Art. VII, s. 1.

1342. How abolished. The justices of the peace in any county may abolish the office of county treasurer; and thereupon, the duties and liabilities attached to the office shall devolve upon the sheriff, who shall be ex officio county treasurer. And in any county where the office of treasurer has been abolished, the justices of the peace may also, if they shall deem it expedient to do so, restore the office of treasurer.

Code, s. 768; R. C., c. 29, s. 10; 1852, c. 6; 1876-7, c. 141; 1881, c. 362.

1343. Includes person acting as such; treasurer of county board of education. The office of county treasurer shall always be construed to refer to, and include, the person authorized by law to perform the duties of that office in any county, if there is no county treasurer therein. The county treasurer shall be ex officio the treasurer of the county board of education.

Code, s. 770.

1344. Sheriff acting as such, bond liable. In counties where the office of county treasurer may be abolished, and where the sheriff is authorized to perform the duties of county treasurer, the bond he gives as sheriff shall be construed to include his liabilities and duties as such county treasurer, and may be increased to such amount by the board of commissioners as may be deemed necessary to cover the trust funds coming to his hands.

Code, s. 769; 1879, c. 202.

1345. Duties. It shall be the duty of the treasurer—

1. TO KEEP COUNTY MONEYS.

To receive all moneys belonging to the county, and all other moneys by law directed to be paid to him, to keep them separate and apart from his own affairs, and to apply them and render account of them as required by law.

2. TO KEEP TRUE ACCOUNTS.

To keep a true account of the receipts and expenditures of all such moneys, taking proper vouchers in every case in books provided for that purpose at the expense of the county; which said books shall at all times show the date, amount, and from whom he shall have received such moneys; the date, amount and to whom he has paid out any of the said moneys, the total amount received and the total amount paid out during the current fiscal year for school purposes, for general county purposes, for jury fund, and for each special purpose, all separately kept, so that at all times his said books shall correctly and accurately show the condition of the said several accounts. His account of expenditures for general county purposes shall also show separately the amounts expended each year on account of the county home, indigent persons, jails, work-houses, courthouse, bridges, insolvent fees, courts, and such other special accounts as shall be required by the board of commissioners of the county, the total of said accounts being the aggregate amount expended during the fiscal year for general county purposes. He shall post at the courthouse door on the first Monday in each month, a correct statement of such receipts and expenditures, showing the amount received, and from what source, and the amounts paid out, and to whom, and for what purpose, and the balance in his hands belonging to the county.

3. TO CALL ON COUNTY OFFICERS FOR FUNDS IN THEIR HANDS.

To call on the sheriff, or the clerk of the superior court, or other officer having county moneys in his hands, at least once in each month, or oftener if necessary, to pay over to him, and to account for all such moneys.

4. TO KEEP ACCOUNTS OF FINES, ETC.

To enter in a book to be kept by him the exact amount of any fine, penalty or forfeiture paid over to him, giving the date of payment, the name of the clerk or other person so paying the same, the name of the party from whom such fine, penalty or forfeiture was collected, and in what case.

5. TO EXHIBIT TO THE BOARD OF COMMISSIONERS HIS BOOKS AND ACCOUNTS AS TREASURER FOR EXAMINATION.

To exhibit his books and accounts and moneys once every three months, or oftener, if the board of commissioners of his county deem it necessary, to a committee to be composed of the chairman of the

board of commissioners and one other person to be selected by the board of commissioners, who shall be an expert accountant; and it shall be the duty of this committee to examine the books and accounts of his office, and to see that the accounts are correctly and properly kept, and to count the money in the hands of the treasurer, and to see that it corresponds with the amount shown by the books to be in his hands. And at every such examination of the books and accounts of his office the county treasurer shall exhibit a full, perfect and itemized statement to said committee of the use he has made of every dollar of public funds in his hands since the last exhibition of his books to said committee, and if any part of said funds has been loaned out this statement shall state to whom loaned and on what security and the amount of interest paid on said loan, and such interest shall be by the treasurer covered into the county treasury. This statement shall be sworn to and published in a county newspaper or at the courthouse door: Provided, that nothing herein contained shall be construed to authorize the county treasurer to lend any public funds. And if at any time there shall be a deficit in the amount of money in the hands of the treasurer, the committee shall so report to the board of commissioners, whose duty it shall be to institute proceedings in the superior court against said treasurer for violation of his official duties.

Code, ss. 96, 773; 1889, c. 242.

1346. Commissioners may designate banks of deposit for funds in hands of. Whenever any county treasurer shall petition the board of county commissioners to name a place of deposit for the public funds in his hands, the said board may designate the nearest national or state banks that they may deem safe and reliable, and such county treasurer may place the public funds in his hands in the bank or banks so designated during the then current term of his office.

1889, c. 436.

1347. Statement to be filed with commissioners; interest belongs to fund. At the time of making such deposit he shall file with the board of county commissioners a statement of the amount so deposited, to what fund belonging, and what interest, if any, is to be paid. Said interest shall be accounted for by such treasurer as other moneys that come into his hands.

1889, c. 436, s. 2.

1348. Transportation expenses borne by; fund loses if bank fails. The transportation of said funds to the designated bank shall be at the expense of the county treasurer, as shall also its return to him for disbursement. Any loss that may be sustained by reason of the failure of such banks shall be borne by the public fund to which

said money may belong, only when this chapter has been in all respects strictly complied with.

1889, c. 436, s. 3.

1349. Not to speculate in county claims; forfeits office thereby.

No county treasurer purchasing a claim against the county at less than its face value, shall be entitled to charge the county a greater sum than what he actually paid for the same; and the board of commissioners may examine him as well as any other person on oath concerning the matter; and any county treasurer who shall be concerned or interested in any such speculation shall forfeit his office.

Code, s. 772; 1868-9, c. 157, s. 8.

1350. Administers property held in trust for county. In all cases where any property, real or personal, shall have been held by deed, will or otherwise, by any person or officer in trust for any county, or for any charitable use to be administered in, and for, the benefit of such county, or the citizens thereof, such property shall be transferred to, and vest in the county treasurer, to be administered and applied by him under the direction of the board of commissioners, upon the same uses, purposes and trusts as declared by the grantor, testator, or other person in the original deed, devise or other instrument of donation.

Code, s. 778; 1869-70, c. 85.

1351. To take charge of county trust funds; additional bond required. It shall be the duty of the county treasurer to take charge of all such trust funds and property; but he shall not do so, without giving a bond payable to the state, in a penalty double the estimated value of said property or funds, with three or more sureties, each of whom shall be worth at least the amount of the penalty of the bond, over and above all his liabilities, and property exempt from execution, which bond shall be taken by the board of commissioners, and shall be recorded and otherwise treated and dealt with as the official bond of the treasurer.

Code, s. 779; 1869-70, c. 85, s. 2.

1352. Commissioners to keep a record of trust funds. The board of commissioners shall keep a proper record of all such trust property or charitable funds, and when necessary shall institute proceedings to recover for the treasurer all such as may be unjustly withheld.

Code, s. 780; 1869-70, c. 85, s. 3.

1353. Exhibits amounts and condition of trust funds. The county treasurer, whenever he is required to exhibit to the board of commissioners the financial condition of the county, shall exhibit

also distinctly and separately the amount and condition of all such trust funds and property, how invested, secured, used, and other particulars concerning the same.

Code, s. 781; 1869-70, c. 85, s. 4.

1354. Pays no claim unless audited. It shall not be lawful for the county treasurer to pay a claim against the county, unless the same shall have been audited and allowed by the board of commissioners.

Code, s. 777; 1868-9, c. 19.

1355. Books, papers and money delivered to successor. Whenever the right of any county treasurer to his office expires, the books and papers belonging to his office, and all moneys in his hands by virtue of his office shall, upon his oath, or in case of his death upon the oath of his personal representative, be delivered to his successor.

Code, s. 767; 1868-9, c. 157.

1356. Action on bond, brought by commissioners. The board of commissioners shall bring an action on the treasurer's bond, whenever they have knowledge or a reasonable belief of any breach of the bond.

Code, s. 771; 1868-9, c. 157.

1357. Officers failing to account to treasurer sued by county commissioners. In case of the failure or refusal of a sheriff, clerk, or other officer to account and pay over, when called on as directed in this chapter, the treasurer shall report the facts to the board of commissioners, who may forthwith bring suit on the official bond of such delinquent officer, and the said board is also allowed to bring suit on the official bond of the clerk of the superior court of any adjoining county.

Code, s. 775; 1868-9, c. 157, s. 10.

NOTE. For bond of treasurer, see Bonds.

For compensation, see Salaries and Fees.

For compensation of examining committee, see Salaries and Fees.

CHAPTER 26.

COURTS—JUSTICES.

| | Sections. |
|--------------------------------|-----------|
| I. General provisions, | 1358—1364 |
| II. Dockets, | 1365—1367 |
| III. Civil jurisdiction. | 1368—1375 |
| IV. Criminal jurisdiction, | 1376 |
| V. Jurors in justices' courts, | 1377—1392 |
| VI. Procedure before trial, | 1393—1402 |
| VII. Rules of procedure, | 1403—1424 |
| VIII. Judgment and execution, | 1425—1434 |
| IX. Appeal, | 1435—1441 |
| X. Forms, | 1442 |

I. GENERAL PROVISIONS.

1358. Constitution, article seven abrogated; exceptions. All the provisions of article seven of the constitution inconsistent with this chapter, except those contained in sections seven, nine and thirteen, are hereby abrogated, and the provisions of this chapter substituted in their place; subject, however, to the power of the general assembly to alter, amend or abrogate the provisions of this chapter, and to substitute others in their stead, as provided in section fourteen of article seven of the constitution.

Code, s. 818; 1876-7, c. 141, s. 7.

1359. When and how justices elected. At every general election held for members of the general assembly, there shall be elected in each township (except those in the counties of Bertie, Caswell, Chowan, Forsyth, Granville, Harnett, Montgomery, Vance, Warren and Washington, in which counties justices of the peace shall be elected by the general assembly), three justices of the peace, and for each township in which any city or incorporated town is situated, one justice of the peace for every one thousand inhabitants in such town or city, who shall hold their offices for two years, except that in the county of Edgecombe there shall be elected one justice of the peace for each and every one hundred duly qualified electors in each township, and for every fraction of one hundred over fifty.

1895, c. 157, s. 4; 1899, c. 392; 1903, cc. 191, 207, 790; 1876-7, c. 141; Code, s. 819.

1360. When justices shall qualify; vacancies. Every person elected or appointed a justice of the peace, before his term of office begins or within thirty days thereafter, shall take and sub-

scribe the prescribed oath of office before the clerk of the superior court, who shall file the same. All elections of justices of the peace by the general assembly or by the people, shall be void unless the persons so elected shall qualify as herein directed. All original vacancies in the office of justice of the peace occurring before qualification as provided in this section, shall be filled for the term by the governor. All other vacancies shall be filled by the clerk of the superior court.

Code, s. 821; 1901, c. 37.

1361. Office forfeited by removal from township. When any justice of the peace removes out of his township and does not return therein for the space of six months, he thereby forfeits and loses his office.

Code, s. 822.

1362. Resignation. Justices of the peace wishing to resign, must deliver their letters of resignation to the clerk of the superior court, who shall file the same.

Code, s. 823.

1363. Punishment on conviction of infamous crimes. Upon the conviction of any justice of the peace of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state.

Code, s. 826.

1364. Office under the United States. Any justice of the peace may accept a civil office or appointment of trust or profit, under the authority of the United States, the duties of which confine him to the county where he is resident.

Code, s. 825; Const., Art. IV, s. 7.

II. DOCKETS.

1365. Furnished by county commissioners. A civil and a criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice.

Code, s. 831.

1366. Filed with clerks. Each justice of the peace, as often as he has filled his docket, shall file the same with the clerk of the superior court for his county.

Code, s. 827.

1367. Dockets, papers and books delivered to clerk for successor. When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, all law and other books furnished him as a justice of the peace, and all official papers to the clerk of the superior court for his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor.

Code, s. 828; 1885, c. 372.

III. CIVIL JURISDICTION.

1368. Actions on contract. Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except:

1. Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars.

2. Wherein the title to real estate is in controversy.

Const., Art. IV, s. 27; Code, s. 834.

1369. Actions not on contract. Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars.

Const., Art. IV, s. 27; Code, s. 887.

1370. Action dismissed, when; remitter for jurisdiction. Where it appears, in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of principal, above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: "The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess."

Code, s. 835; 1868-9, c. 159, s. 3; 1876-7, c. 63.

1371. Where title to real estate is in controversy. In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth, in his answer, any matter showing that such title will come in question. Such answer shall

be in writing, signed by the defendant or his attorney, and delivered to the justice.

Code, s. 836.

1372. Title to real estate in controversy, action dismissed. If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs.

Code, s. 837.

1373. Another action may be brought; estoppel by former plea. When an action, before a justice, is dismissed upon answer, and proof by the defendant, that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the superior court, and the defendant shall not be admitted in that court to deny the jurisdiction by an answer contradicting his answer in the justice's court.

Code, s. 838.

1374. May issue process and try causes, where. A justice of the peace may issue a summons or other process anywhere in his county, but he shall not be compelled to try a cause out of the township for which he was elected or appointed.

Code, s. 824.

1375. Profane swearing punished as a contempt. If any person shall profanely swear or curse in the hearing of a justice of the peace, holding court, the justice may commit him for contempt, or fine him fifty cents.

Code, s. 848; R. C., c. 115; 1741, c. 30.

IV. CRIMINAL JURISDICTION.

1376. Jurisdiction in criminal actions. Justices of the peace shall have exclusive original jurisdiction of all assaults, assaults and batteries, and affrays, where no deadly weapon is used and no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law shall not exceed a fine of fifty dollars, or imprisonment for thirty days: Provided, that justices of the peace shall have no jurisdiction over assaults with intent to kill, or assaults with intent to commit rape, except as committing magistrates: Provided further, that nothing in this section shall prevent the superior or criminal courts from finally hearing and determining such affrays as shall be committed within one mile of the place where and during the time such court is being held; nor shall this section be construed to prevent said

courts from assuming jurisdiction of all offenses whereof exclusive original jurisdiction is given to justices of the peace if some justice of the peace, within twelve months after the commission of the offense, shall not have proceeded to take official cognizance of the same.

Const., Art. IV, s. 27; Code, s. 892; 1889, c. 504, s. 2.

NOTE. For criminal procedure in justice's court, see Criminal Procedure.

V. JURORS IN JUSTICES' COURTS.

1377. Jury list furnished. The clerk of the board of commissioners shall furnish on demand, to each justice of the peace in the county, a list of the jurors for the township for which such justice is elected or appointed.

Code, s. 854.

1378. To keep jury box. Each justice shall keep a jury box, having two divisions marked respectively number one and number two, and having two locks, the key to be kept by the justice.

Code, s. 855.

1379. Names of jurors deposited in box. Each justice shall cause the names on his jury list to be written on small scrolls of paper of equal size, and to be placed in the jury box, in division marked number one, until drawn out for the trial of an issue as required by law.

Code, s. 856.

1380. Trial by jury waived, if not demanded. A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury.

Code, s. 857.

1381. Deposit of jury fees. Before a party is entitled to a jury he shall deposit with the justice the sum of three dollars for jury fees, and the justice shall pay to all persons who attend, pursuant to the summons, as well to those who do not actually serve as to those who do serve, twenty-five cents each, to be included in the judgment as part of the costs, in case the party demanding the jury recover judgment, but not otherwise. The justice shall refund to the party the fees of all jurors who do not attend.

Code, s. 869.

1382. Jury drawn and trial postponed. When a trial by jury is demanded, the justice shall immediately, in the presence of the

parties, proceed to draw the names of twelve jurors from division marked number one of the jury box; and the trial of the cause shall thereupon be postponed to a time and place to be fixed by the justice.

Code, s. 858.

1383. Summoning the jury. A list of the jurors so drawn shall be immediately delivered by the justice to any constable, or other lawful officer, with an order indorsed thereon, directing him to summon the persons named in the list to appear as jurors at the time and place fixed for the trial; and it is the duty of the officer to proceed forthwith to summon such jurors, or so many of them as can be found, according to the order; and he shall make return thereof at the time and place appointed, stating in his return the names of the jurors summoned by him.

Code, s. 859.

1384. Jury for trial, how selected. At the time and place appointed, and on return of the order, if the trial be not further adjourned, and if adjourned, then at the time and place to which the trial shall be adjourned, the justice shall proceed, in the presence of the parties, to draw from the jurors summoned the names of six persons to constitute the jury for the trial of the issue.

Code, s. 860.

1385. Challenges. Each party shall be entitled to challenge, peremptorily, two of the persons drawn as jurors.

Code, s. 861.

1386. What names returned to the jury box. The scrolls containing the names of jurors not summoned, if any, and of those summoned, but not drawn, and of those drawn, but challenged and set aside, must be returned by the justice to his jury box, in division marked number one: Provided, that the scrolls containing the names of such as are not legally liable, or legally qualified to serve as jurors, shall be destroyed.

Code, s. 862.

1387. Tales jurors may be summoned. If a competent and indifferent jury is not obtained from the twelve jurors drawn, as before specified, the justice may direct others to be summoned from the bystanders, sufficient to complete the jury.

Code, s. 863.

1388. Not compelled to serve out of township. No person is compelled to serve as a juror in a justice's court out of his own township, except as a talesman.

Code, s. 867.

1389. Less than six a jury by consent. Six jurors shall constitute a jury in a justice's court, but, by consent of both parties, a less number may constitute it.

Code, s. 866.

1390. Jurors serving on trial. The scrolls containing the names of the jurors who serve on the trial of an issue must be placed in the jury box in division marked number two, until all the scrolls in division marked number one have been drawn out. As often as that may happen, the whole number of scrolls shall be returned to division marked number one, to be drawn out as in the first instance.

Code, s. 868.

1391. Additional deposit for jury fees for adjournment. No adjournment shall be granted after the return of the jury, unless the party asking the same shall, in addition to the other conditions imposed on him by law or by the justice, deposit with the justice, to be immediately paid to the jurors attending, the sum of twenty-five cents each, such amount to be in no case included in the judgment as part of the costs. On such adjournment, the jurors shall attend at the time and place appointed, without further summons or notice; and the fees for the jury, deposited with the justice according to section thirteen hundred and eighty-one, shall remain in his hands until the jury are impaneled on the trial, and shall be then immediately paid to the jurors or to the party entitled thereto.

Code, s. 870.

1392. Jury sworn; impaneled; verdict; judgment. The jury shall be sworn and impaneled by the justice, who shall record their verdict in his docket and enter a judgment in the case according to such verdict.

Code, s. 864.

VI. PROCEDURE BEFORE TRIAL.

1393. Summons, civil action begun by. Civil actions in these courts shall be commenced by the issuing of a summons.

Code, s. 830; 1868-9, c. 159, s. 9.

1394. Summons, by whom issued and what to contain. The summons shall be issued by the justice and signed by him. It shall run in the name of the state, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall

also contain a statement of the sum demanded by the plaintiff or the value of the property sued for.

Code, s. 832; 1874-5, c. 234.

1395. Service and return of summons; fees in advance. The officer to whom the summons is delivered shall execute the same within five days after its receipt by him, or immediately, if required to do so by the plaintiff. Before proceeding to execute it, he is entitled to require of the plaintiff his fees for the service. When executed he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same.

Code, s. 833.

1396. When process issues to another county. No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such nonresident defendant resides.

Code, s. 871; 1876-7, c. 287.

1397. How process issues to another county. In all civil actions in courts of justices of the peace where one or more of the defendants may reside in a county other than that of the plaintiff, it shall be lawful for any justice of the peace within the county where such defendant or defendants may reside, upon proof of the handwriting of the justice of the peace who issued the process, to indorse his name on the same, or a duplicate thereof, and such process so indorsed shall be executed in like manner as if it had been originally issued by the justice indorsing it.

Code, s. 872; 1870-1, c. 60.

1398. Certificate of clerk on process for another county. In all cases referred to in the preceding section, it shall be lawful for the clerk of the superior court of the county in which the action is brought, to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed, to make an entry of the date of its reception, and to execute the same as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued.

Code, s. 873; 1870-1, c. 60, s. 2.

1399. When judgment entered against defendants in another county. No justice of the peace shall enter a judgment under the two

preceding sections against any defendant who may be a nonresident of his county, unless it shall appear that the process was duly served upon him at least ten days before the return day of the same.

Code, s. 874; 1876-7, c. 57.

1400. Attendance of witnesses procured. The justice, on application of either party, shall, by a subpoena or by an order in writing on the process, direct the constable or other officer to summon witnesses to appear and give testimony at the time and place appointed for the trial. Each witness, failing to appear, shall forfeit and pay eight dollars to the party at whose instance he was summoned, and shall be further liable to such party for all damage sustained by nonattendance. The fine herein imposed may be recovered, on motion, before the justice who tried the action, unless the witness on a notice of five days, by affidavit or other proof, show sufficient excuse for his failure to attend.

Code, s. 847.

1401. When subpoenas issue to other counties; costs in advance. Justices of the peace, in all civil cases may issue subpoenas to counties other than their own; such subpoenas shall be authenticated in the same manner as provided by law for the authentication of process. When so authenticated the sheriff, constable or other officer to whom the same is directed shall execute and return the same as provided for the return of process: Provided, that where witnesses attend in counties other than their own under such subpoena they shall receive the same per diem and mileage as witnesses who attend the superior courts: Provided further, that before issuing such subpoenas the party wanting such witness shall deposit with the justice before whom the cause is pending one day's per diem and the mileage of said witness to and returning from place of trial, which amount shall be paid to said witness on his attendance and taxed against the party cast in the trial.

1893, c. 436.

1402. Removals. In all proceedings and trials, both criminal and civil, before justices of the peace, the justice before whom the writ or summons is returnable, shall, upon affidavit made by either party to the action that he is unable to obtain justice before him, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township: Provided, that no cause shall be more than once removed: Provided further, that such motion to remove shall be made before evidence is introduced.

Code, s. 907; 1880, c. 15; 1883, c. 66.

VII. RULES OF PROCEDURE.

1403. Rule I. Pleadings. The pleadings in these courts are—

1. The complaint of the plaintiff.
2. The answer of the defendant.

Code, s. 840.

1404. Rule II. Pleadings, oral or written. The pleadings may be either oral or written; if oral, the substance must be entered by the justice on his docket; if written, they must be filed by the justice, and a reference to them be made on his docket.

Code, s. 840, rule 2.

1405. Rule III. Complaint. The complaint must state, in a plain and direct manner, the facts constituting the cause of action.

Code, s. 840, rule 3.

1406. Rule IV. Answer. The answer may contain a denial of the complaint, or of any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense or counterclaim.

Code, s. 840, rule 4.

1407. Rule V. Demurrer. Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defense, although it be taken as true.

Code, s. 840, rule 11.

1408. Rule VI. When demurrer is sustained. If the justice deem the objection well founded, he shall order the pleading to be amended on such terms as he may think just; and if the party refuse to amend, the defective pleading shall be disregarded.

Code, s. 840, rule 12.

1409. Rule VII. No particular form for pleadings. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant.

Code, s. 840, rule 5.

1410. Rule VIII. No judgment by default. Where a defendant does not appear and answer, the plaintiff must still prove his case before he can recover.

Code, s. 840, Rule 6.

1411. Rule IX. Action on account or note. In an action or defense, founded on an account or an instrument for the payment of money only, it is sufficient for a party to deliver the account or instru-

ment to the justice and state that there is due him thereon from the adverse party a specified sum, which he claims to recover or set off.

Code, s. 840, Rule 7.

1412. Rule X. Variance between pleading and proof. A variance between the evidence on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby.

Code, s. 840, Rule 8.

1413. Rule XI. Process not quashed for form. No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside, for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending, shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment.

Code, s. 908; R. C., c. 3, c. 62, s. 22; 1794, c. 414.

1414. Rule XII. Pleadings amended. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. If the amendment be made after the joining of the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party.

Code, s. 840, Rule 9.

1415. Rule XIII. Account or demand exhibited. The justice may at the joining of issue, require either party, at the request of the other, at that or some other specified time to exhibit his account or demand, or state the nature thereof as far forth as may be in his power; and in case of his default, the justice shall preclude him from giving evidence of such parts thereof as have not been so exhibited or stated.

Code, s. 840, Rule 10.

1416. Rule XIV. Proceedings recorded. The justice shall enter all his proceedings in a cause tried before him in his docket. No part of such proceedings must be entered on the summons, on the pleadings or on any other paper in the cause.

Code, s. 840, Rule 13.

1417. Rule XV. Tender of judgment. The defendant may, on the return of process and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceeding be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer.

Code, s. 840, Rule 16.

1418. Rule XVI. Continuance. Any justice before whom an action is brought, may, on sufficient excuse therefor shown on the affidavit of either party or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days.

Code, s. 840, rule 17.

1419. Rule XVII. Chapter on civil procedure applicable to forms, limitations and parties. The chapter on civil procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justice's courts.

Code, s. 840, Rule 15.

1420. Rule XVIII. Chapter on civil procedure applicable in attachment. The chapter on civil procedure is applicable to proceedings by attachment before justices of the peace, in all cases founded on contract wherein the sum demanded does not exceed two hundred dollars, and where the title to real estate is not in controversy.

Code, s. 853.

1421. Rule XIX. Chapter on civil procedure applicable to claim and delivery and in arrest and bail. The chapter on civil procedure is applicable, except as herein otherwise provided, to proceedings in justices' courts concerning claim and delivery of personal property and arrest and bail, substituting the words "justice of the peace" for "judge," "clerk" or "clerks of the court," and inserting the words "or constable" after "sheriff," whenever they occur.

Code, ss. 511, 889; 1876-7, c. 251.

1422. Rule XX. Damages to real estate and conversion of personalty, same rules. All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the conversion

of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court.

Code, s. 888; 1876-7, c. 251.

1423. Rule XXI. Suit on judgment, evidence in. On the trial of an action founded on a former judgment, the judgment itself shall be evidence of the debt, subject to such payments as have been made.

Code, s. 844.

1424. Rule XXII. When rehearing granted. When a judgment has been rendered by a justice, in the absence of either party, and when such absence was caused by the sickness, excusable mistake or neglect of the party, such absent party, his agent or attorney, may, within ten days after the date of such judgment, apply for relief to the justice who awarded the same, by affidavit, setting forth the facts, which affidavit must be filed by the justice; whereupon the justice, if he deem the affidavit sufficient, shall open the case for reconsideration; and to this end, he shall issue a summons, directed to a constable, or other lawful officer, to cause the adverse party, together with the witnesses on both sides, to appear before him at a place and at a time, not exceeding twenty days, to be specified in the summons, when the complaint shall be reheard, and the same proceedings had as if the case had never been acted on. If execution has been issued on the judgment, the justice shall direct an order to the officer having such execution in his hands, commanding him to forbear all further proceedings thereon, and to return the same to the justice forthwith.

Code, s. 845.

NOTE. See s. 1435.

VIII. JUDGMENT AND EXECUTION.

1425. Docketing justice's judgment; lien; stay of execution; clerk's duty; costs; docketed in other counties. A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the defendant, or his attorney, a transcript of any stay of execution issued, or which may thereafter be issued, by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of said court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; and from that time the judgment shall be a judgment of the superior court in all respects. The execution thereon shall be issued by the

clerk of the superior court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the superior court: Provided, however, that in cases of appeal to the superior court from a judgment so docketed, when judgment is rendered in the superior court on such appeal, the lien acquired by the docketing of such justice's judgment shall merge into the judgment of the superior court, and continue as a lien from the date of the docketing of said justice's judgment, and be superior to any other judgment docketed subsequent to the date of the justice's judgment (prior attachment liens and judgment on same excepted), and the clerk of the superior court shall carry forward and tax into the judgment of the superior court all costs incurred in the justice's court, including transcript and docketing, as well as all costs incurred in the superior court, and shall issue execution only on the judgment rendered in the superior court, and not upon the justice's judgment. And when judgment is rendered in the superior court, it shall be the duty of the clerk to enter upon the page of the judgment docket where the justice's judgment is docketed, as follows: "Judgment in superior court....day of....., see Judgment Docket...., page...." He shall date same and sign it as clerk: Provided further, that when the judgment of the superior court is satisfied, it shall be a satisfaction of the justice's judgment, and the clerk shall so note such satisfaction on the record of the justice's judgment: Provided, that in case a stay of execution upon such judgment shall be granted, as provided herein, execution upon such judgment shall not be issued by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript.

Code, s. 839; 1903, c. 179.

1426. Justice's judgment removed to another county. Any person who may desire to have a justice's judgment in his favor removed to another county to be enforced against the goods and chattels of the defendant, must obtain from the justice who rendered the judgment a transcript thereof, under his hand; and must further procure a certificate from the clerk of the superior court of the county where the judgment was rendered, under the seal of his court, that the justice who gave the judgment was, at the rendition thereof, a justice of said county. On such transcript of the judgment, thus certified, any justice in any other county may award execution for the sum therein expressed.

Code, s. 846.

1427. Execution, when issued and returnable. Execution may be issued on a judgment, rendered in a justice's court, at any time within one year after the rendition thereof, and shall be returnable sixty days from the date of the same.

Code, s. 840, Rule 14.

1428. Execution on, when a lien, and on what. Executions issued by a justice, which must be directed to any constable or other lawful officer of the county, shall be a lien on the goods and chattels of the defendant named therein, from the levy thereof only, but shall not be levied on or enforced in any manner against real estate; but when a justice's judgment shall be made a judgment of the superior court, as is elsewhere provided, the execution shall be capable of being levied and collected out of any property of the defendant in execution, and it shall be a lien on the real estate of said defendant from the time when it becomes a judgment of the superior court.

Code, s. 841; 1868-9, c. 159, s. 5.

1429. Stay of execution granted by justice. In all actions founded on contract, whereon judgments are rendered in justices' courts, stay of execution, if prayed for at the trial by the defendant or his attorney, shall be granted by the justices in the following manner: For any sum not exceeding twenty-five dollars, one month; for any sum above twenty-five dollars and not exceeding fifty dollars, three months; for any sum above fifty dollars and not exceeding one hundred dollars, four months; for any sum above one hundred dollars, six months. But no stay of execution shall be allowed in any action wherein judgment is rendered on a former judgment taken before a justice of the peace.

Code, s. 842; 1868-9, c. 272.

1430. Security on stay of execution. The party praying for a stay of execution shall, within ten days after the trial, give sufficient security, approved by the justice, for payment of the judgment, with interest thereon till paid, and cost; and the acknowledgment of the surety, entered by the justice in his docket and signed by the surety, shall be sufficient to bind such surety. If the judgment be not discharged at the time to which execution has been stayed, the justice who awarded the judgment shall issue execution against the principal, or surety, or both.

Code, s. 843.

1431. Execution stayed; undertaking on appeal before clerk. If an appellant desire a stay of execution of the judgment, he may apply, at any time, to the clerk of the appellate court for leave to give the undertaking, as provided in a subsequent section; who shall, upon

the undertaking being given, make an order that all proceedings on the judgment be stayed.

Code, s. 882.

1432. Undertaking on appeal before justice. In all cases of appeal from justices' courts the appellant may give an undertaking for the appeal before the justice who tried the cause, and who shall indorse his approval thereon, instead of before the clerk of the appellate court.

Code, s. 883; 1869-70, c. 187.

1433. Undertaking on appeal; what to contain. The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the appellant, and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties.

Code, s. 884; 1879, c. 68.

1434. Delivery of undertaking, execution stayed; copy served on appellee. A delivery of a certified copy of the order, hereinbefore mentioned, to the justice of the peace, shall stay the issuing of an execution on the judgment; if it has been issued, the service of a certified copy of such order on the officer holding the execution shall stay further proceedings thereon. A certified copy of such order shall also be served on the respondent, or on his agent or attorney, within ten days after the making thereof.

Code, s. 885.

IX. APPEAL.

1435. New trial not allowed; either party may appeal. A new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court may appeal therefrom to the superior court, as hereinafter prescribed.

Code, s. 865.

Note. See s. 1424.

1436. Does not stay execution. No appeal shall prevent the issuing of an execution on a judgment, or work a stay thereof, except as hereinafter provided.

Code, s. 875; 1876-7, c. 251, s. 6.

1437 Appeal, when and how taken. The appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered

upon process not personally served, and the defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for.

Code, s. 876; 1876-7, c. 251, s. 7.

1438. Notice in open court sufficient. Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party.

Code, s. 877; 1869-70, c. 187; 1876-7, c. 251, s. 8.

1439. Justice to make return of within ten days. The justice shall, within ten days after the service of the notice of appeal on him, make a return to the appellate court and file with the clerk thereof the papers, proceedings and judgment in the case, with the notice of appeal served on him. He may be compelled to make such return by attachment. But no justice shall be bound to make such return until the fees, prescribed by law for his service, be paid him. The fee so paid shall be included in the costs, in case the judgment appealed from is reversed.

Code, s. 878.

1440. Defective return amended. If the return be defective, the judge or clerk of the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with the order by attachment.

Code, s. 879.

1441. Restitution, when ordered. If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal, on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment.

Code, s. 886.

X. FORMS.

1442. Forms to be used in justice's court. The following forms, or substantially similar ones, shall be sufficient in all cases of proceedings in civil actions, provided for in this chapter:

[No. 4.]

ANOTHER FORM OF AFFIDAVIT TO OBTAIN ATTACHMENT.

(Title, etc., as in No. 1.)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to plaintiff in the sum of..... dollars for goods sold and delivered to said defendant by the plaintiff on or about the.....day of.....19....

2. That the said defendant has departed from this state, or keeps himself concealed therein with intent, as defendant is informed and believes, to avoid the service of a summons (or with intent, etc., to defraud defendant's creditors).

A. B.....

(Sworn to, etc., as in No. 3.)

[No. 5.]

AFFIDAVIT AGAINST A FOREIGN CORPORATION.

North Carolina, County.

| | |
|-------------------------|--------------------------------------|
| A.....B..... | } Before....., Justice of the Peace. |
| against | |
| The Highland Mining Co. | |

A. B., the plaintiff above named, being duly sworn, deposes and says:

1. That the defendant above named is indebted to the plaintiff in the sum ofdollars, for the use and occupation of certain premises, by permission of plaintiff, from the.....day of.....19.... until the.....day of19....

2. That the defendant is a foreign corporation, created under the laws of the state of.....

3. That the cause of action above stated arose in this state.

A. B.....

(Sworn to, etc., as in No. 3.)

[No. 6.]

UNDERTAKING UPON ATTACHMENT.

(Title as in No. 1 or No. 5.)

Whereas, the plaintiff above named is about to apply for a warrant of attachment against the property of the above-named defendant:

Now, therefore, we, J. W. B., of.....county, and W. D. M., of.....county, undertake in the sum of.....dollars (the sum must be at least two hundred dollars), that if the said warrant be granted, and the defendant recover judgment in this action, or the attachment be set aside by order of the court, the plaintiff shall pay all costs that may be awarded to defendant in the same, and all damages which he may sustain by reason of such attachment.

J. W. B.....

W. D. M.....

Signed and delivered in the presence of G. W. H., Esq., this.....day of19....

G. W. H.....
Justice of the Peace.

[No. 7.]

WARRANT OF ATTACHMENT.

(Title as in No. 1 or No. 5.)

State of North Carolina, to any constable or other lawful officer of.....
county—Greeting:

It appearing by affidavit to the undersigned that a cause of action exists in favor of the plaintiff against the defendant for the sum of.....dollars, and that the defendant is not a resident of this state (or otherwise, as the fact may be), and the plaintiff having given the undertaking as required by law;

Now, therefore, you are commanded forthwith to attach and safely keep all the property of the said defendant C. D. in your county, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, with costs and expenses; and have you this warrant before G. W. H., one of the justices of the peace for your county, at his office in said county, on the.....day of.....19.... with your proceedings hereon.

Witness our said justice, this.....day of.....19....

G. W. H.....
Justice of the Peace.

[No. 8.]

OFFICER'S RETURN TO BE INDORSED ON ATTACHMENT.

I, O. P. M., constable (or sheriff) of.....county, do hereby return that, by virtue of the within attachment, I have seized and taken into my possession the tangible personal property (or, have levied on the real estate, as the case may be) of the defendant within named, specified in the inventory hereto annexed.

Dated this.....day of.....19....

O. P. M.....

[No. 9.]

INVENTORY OF PROPERTY ATTACHED TO ABOVE RETURN.

(Title as in No. 1 or No. 5.)

I do hereby certify that the following is a true and just inventory of all the property seized or levied on by me under a warrant of attachment, issued in the above-entitled action by G. W. H., Esq., with a statement of the books, vouchers, papers, rights and credits taken into my custody by virtue of said warrant. (Insert list of property by items.)

I do further testify that the following property mentioned in the above inventory is perishable, and that the expense of keeping the same until the termination of the suit would exceed one-fifth of its value; and I do hereby apply to this court for authority to sell the same. (Insert a list of perishable property.)

Dated this.....day of.....19....

O. P. M.....
Constable (or Sheriff).

[No. 10.]

ORDER DIRECTING SALE OF PERISHABLE PROPERTY.

(Title as in No. 1 or No. 5.)

It appearing by the inventory returned by O. P. M., constable (or sheriff), under the warrant of attachment granted in this action, that the following property mentioned in said inventory is perishable, to-wit: (Insert here the list of perishable property.)

* It is therefore ordered that the said property be sold by the said officer at public auction, at such time and place as he shall deem advisable, and that the said officer give notice of such sale as the sale of personal property on execution.

It is further ordered that the proceeds of such sale be retained by said officer, and disposed of in the same manner as the property itself, if the same had not been sold.

Dated this.....day of.....19....

G. W. H.....
Justice of the Peace.

[No. 11.]

NOTICE OF LEVY ON PROPERTY NOT CAPABLE OF MANUAL DELIVERY.

To H. B.....:

Take notice that by warrant of attachment issued in this action, a certified copy of which is herewith served upon you, I have levied upon, and do hereby levy upon, your indebtedness, amounting to.....dollars or thereabouts, to the defendant above named. (Describe as particularly as possible the shares, debts or property levied upon.)

Dated this..... day of.....19....

O. P. M.....
Constable (or Sheriff).

The officer will indorse on the copy of the attachment served with the above notice, the following certificate:

I do hereby certify that the within is a true copy of the warrant of attachment in my possession, issued in this action, and of the whole thereof.

Dated this.....day of.....19....

O. M. P.....
Constable (or Sheriff).

[No. 12.]

ORDER DIRECTING THIRD PERSON (H. B.) TO APPEAR AND BE EXAMINED.

(Title as in No. 1 or No. 5.)

It appearing to me by the certificate of O. P. M., constable (or sheriff) of said county, that the said officer, with a warrant of attachment against the property of C. D., the defendant in this action, has applied to H. B. for the purpose of levying upon a debt owing to the defendant by said H. B. (or upon property of said defendant held by said H. B., or otherwise), and that the said H. B. refuses to furnish said officer with a certificate designating the amount of the debt owing by said H. B. to the defendant, or the amount and description of the property held by said H. B. for the benefit of the defendant.

Now, therefore, I do order and require the said H. B. to attend before me at my office on the.....day of.....19...., and be examined on oath concerning the same.

Dated this.....day of.....19....

G. W. H.....
Justice of the Peace.

[No. 13.]

ATTACHMENT TO ENFORCE OBEDIENCE TO ABOVE ORDER.

(Title as in No. 1 or No. 5.)

State of North Carolina, to any constable or other lawful officer of..... county—Greeting:

Whereas, it appears that H. B. was duly served on the.....day of 19.... with an order issued by G. W. H., Esq., one of our justices of the peace

for said county, requiring said H. B. to attend before said justice at his office, in said county, on the.....day of.....19.... and be examined on oath concerning a certain debt owing to the defendant, named in the above action, by the said H. B. (or property held by the said H. B. for the benefit of the defendant, or otherwise, as the case may be).

And whereas, the said H. B., in contempt of said order, has refused or neglected, and doth still refuse or neglect, to appear and be examined on oath, as in said order he is required to do;

Now, therefore, we command you that you forthwith attach the said H. B., so as to have his body before G. W. H., Esq., one of our justices of the peace for your county, on the.....day of.....19.... at his office, in said county, then and there to answer, touching the contempt which he, as is alleged, hath committed against our authority; and further, to perform and abide by such order as our said justice shall make in his behalf. And have you then and there this writ, with a return, under your hand, of your proceedings thereon.

Hereof fail not, at your peril.

Witness, our said justice, this.....day of.....19....

G. W. H.....

Justice of the Peace.

[No. 14.]

UNDERTAKING ON DISCHARGE OF ATTACHMENT.

(Title of the cause as in No. 1.)

Whereas, the property of the above-named C. D. has been attached, and the defendant desires a discharge of said attachment on giving security according to law;

Now, therefore, we, B. B., of.....county, and D. D., of.....county, undertake in the sum of.....dollars (the sum named must be at least double the amount claimed by plaintiff), that if the said attachment be discharged we will pay to the plaintiff, on demand, the amount of the judgment that may be recovered against the defendant in this action.

Dated this.....day of.....19....

(Signed)

B. B.

D. D.

Signed and delivered in the presence of G. W. H., Esq., this day of19....

Justice of the Peace.

ACKNOWLEDGMENT AND AFFIDAVIT OF SURETIES.

North Carolina, County.

On this.....day of.....19.... before me personally appeared the above named B. B. and D. D., known to me to be the persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

And the said B. B. and D. D., being severally sworn, each for himself, says that he is a resident of the State of North Carolina and a householder (or freeholder) therein.

B. B.

D. D.

Sworn and subscribed before me the day above written.

G. W. H.....

Justice of the Peace.

[No. 15.]

ORDER VACATING ATTACHMENT ON SECURITY BEING GIVEN.

(Title as in No. 1 or No. 5.)

The defendant having appeared in this action and applied to discharge the attachment on giving security, and the said defendant having delivered to the court an undertaking in due form of law, which has been duly approved by the court;

It is ordered that the attachment issued in this action on the.....day of19.... be and the same is hereby vacated and discharged, and the defendant is released therefrom in all respects. It is further ordered that any and all proceeds of sales and money collected by O. P. M., constable (or sheriff), and all property attached, now in said officer's possession, be paid and delivered to the said defendant or his agent.

Dated this.....day of.....19....

G. W. H.
Justice of the Peace.

[No. 16.]

FORM OF PUBLICATION TO BE MADE BY PLAINTIFF IN ATTACHMENT.

(Title as in No. 1.)

[Amount sued for] due by note (or otherwise as the fact may be). Warrant of attachment returnable before G. W. H., Esq., a justice of the peace for..... county, North Carolina, at his office (or otherwise as the case may be), on theday of.....19...., when and where the defendant is required to appear and answer the complaint.

Dated this.....day of.....19....

A. B., Plaintiff.

[No. 17.]

AFFIDAVIT FOR ARREST ON DEBT FRAUDULENTLY CONTRACTED.

(Title as in No. 1.)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of..... dollars on an inland bill of exchange, drawn on the.....day of..... 19.... by defendant on the First National Bank of Charlotte, North Carolina, payable at sight to the order of plaintiff.

2. That on the.....day of.....19.... the defendant applied to the plaintiff to purchase a bill of goods amounting to.....dollars, which the plaintiff offered to sell to the defendant for cash; that the defendant, contriving to defraud the plaintiff, represented that he had money on deposit at said National Bank for more than the amount of the proposed purchase, and offered to give plaintiff a sight draft on said bank; that the plaintiff, relying upon the representations of the said defendant, and solely induced thereby, sold and delivered a bill of goods amounting to.....dollars to the defendant, who thereupon drew the sight order on said bank above referred to; that on the.... day of.....19.... the plaintiff presented said draft at said bank for acceptance, when the same was not accepted for want of any funds in said bank to the credit of the defendant; that notice of nonacceptance was given to the defendant, who has wholly refused to pay the draft or any part thereof; that the representations made as aforesaid by the defendant were, and each and every of them was, as deponent is informed and believes, untrue; and that the

defendant, as deponent is informed and believes, did not have, nor expect to have, any funds on deposit at said bank at the making of the representations above mentioned, but said defendant was then and is now wholly insolvent.

A. B.

Sworn to and subscribed before me, this.....day of.....19....

G. W. H.

Justice of the Peace.

[No. 18.]

UNDERTAKING ON ARREST.

(Title as in No. 1.)

Whereas, the plaintiff above named is about to apply (or, has applied) for an order to arrest the defendant, C. D.;

Now, therefore, we, J. J., of.....county, and P. P., of.....county, undertake in the sum of.....dollars (the sum must be at least one hundred dollars), that if the said defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of his arrest in this action.

J. J.

P. P.

Signed in my presence, this.....day of.....19....

G. W. H.

Justice of the Peace.

[No. 19.]

ORDER OF ARREST.

(Title as in No. 1.)

North Carolina,.....County,.....Township.

To any constable or other lawful officer of said county:

For the causes stated in the annexed affidavit:

You are required forthwith to arrest C. D., the defendant named above, and hold him to bail in the sum of.....dollars (the sum should be the amount of the plaintiff's claim), and to return this order before the undersigned at his office in said county, on the.....day of.....19....; of which return you will serve a notice on plaintiff or his attorney.

Dated this.....day of.....19....

G. W. H.

Justice of the Peace.

[No. 20.]

UNDERTAKING OF BAIL ON ARREST.

(Title as in No. 1.)

Whereas, the above named defendant, C. D., has been arrested in this action;

Now, therefore, we, B. B., of.....county (tailor), and D. D., of.....county (merchant), undertake in the sum of.....dollars (the sum should be the same as mentioned in the order of arrest), that if the defendant is discharged from arrest he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce judgment therein.

B. B.

D. D.

Signed in my presence, this.....day of.....19....

G. W. H.

Justice of the Peace.

[No. 21.]

NOTICE OF EXCEPTION TO BAIL.

(Title as in No. I.)

To O. P. M., constable (or sheriff) of the county of.....:

Take notice, that the plaintiff does not accept the bail offered by the defendant in this action (and if the undertaking is defective in form or otherwise, add also), and further he excepts to the form and sufficiency of the undertaking.

Yours, etc.,

A. B....., Plaintiff.

(or, M. W. N....., Attorney for Plaintiff.)

Dated this.....day of.....19....

[No. 22.]

NOTICE OF JUSTIFICATION OF BAIL.

(Title as in No. 1.)

To A. B., plaintiff (or, M. W. N., attorney for plaintiff):

Take notice, that the bail in this action will justify before G. W. H., Esq., a justice of the peace for said county, at the office of said justice, in said county, on the.....day of.....19....

C. D.....

(or, attorney for C. D.), Defendant.

Dated this.....day of.....19....

[No. 23.]

NOTICE OF OTHER BAIL.

(Title, etc., as in No. 1.)

Take notice, that R. S., of.....county (physician), and Y. Y., of.....county (farmer), are proposed as bail, in addition to (or in place of) B. B. and D. D., the bail already put in; and that they will justify (conclude as in last form). Date, etc.

[No. 24.]

JUSTIFICATION OF BAIL.

(Title as in No. I.)

On this.....day of.....19.... before G. W. H., Esq., a justice of the peace for said county, personally appeared B. B. and D. D. (or R. S. and Y. Y., as the case may be), the bail given by the defendant C. D. in this action, for the purpose of justifying pursuant to notice; and the said B. B., being duly sworn, says:

1. That he is a resident and householder (or freeholder) in this state;

2. That he is worth the sum of.....dollars (the amount specified in the order of arrest), exclusive of property exempt from execution.

And the said D. D., being duly sworn, says:

(As with the other bail.)

(And so on with each bail offered.)

(Signatures of bail.)

Examination taken and sworn to before me, this.....day of.....19....

G. W. H.....

Justice of the peace.

[No. 25.]

ALLOWANCE OF BAIL.

(Title as in No. 1.)

The bail of the defendant, C. D., within mentioned, having appeared before me and justified, I do find the said bail sufficient and allow the same.

Dated this.....day of.....19....

G. W. H.....

Justice of the peace.

[No. 26.]

SUBPOENA TO TESTIFY.

State of North Carolina, County.

To S. T....., greeting: (the justice may insert any number of necessary names).

You (and each of you) are commanded to appear personally before G. W. H., Esq., a justice of the peace for said county, at his office in said county, on theday of.....19.... to give evidence in a certain civil action now pending before said justice, and then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the defendant (or plaintiff).^{*} Herein fail not, under the penalty prescribed by law. Witness our said justice, thisday of.....19....

G. W. H.....

Justice of the peace.

[No. 27.]

N. B.—The justice may, instead of a formal subpoena, indorse on the summons or other process an order for witnesses, substantially as follows:

The officer to whom the within process is directed will summon the following persons as witnesses for the plaintiff:.....; and the following as witnesses for the defendant:.....; and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.

Dated this.....day of.....19....

G. W. H.....

Justice of the peace.

[No. 28.]

SUBPOENA DUCES TECUM.

If any witness has a paper or document, which a party desires as evidence at the trial, the justice will pursue the form number 26 as far down as the asterisk (*) and then add the following clause:

And you, S. T., are also commanded to bring with you and there produce as evidence a certain bond (describe particularly) which is now in your possession or under your control, together with all papers, documents, writings or instruments in your custody, or under your control. (Conclude as in form No. 26.)

[No. 29.]

FORM OF OATH OF WITNESS.

You swear that the evidence you will give as to the matters in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you, God.

[No. 30.]

PROCEEDINGS AGAINST DEFAULTING WITNESS.

When a witness, under subpœna, fails to attend, the justice will note the fact in his docket by some such entry as the following:

R. P., a witness summoned on behalf of the plaintiff, called and failed.

If the party who suffers by default of the witness wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

(Title as in No. 1.)

To R. P.:

Take notice, that on the.....day of.....19.... the plaintiff in the above action will move G. W. H., Esq., the justice before whom the trial of said action was had, on the.....day of.....19.... for judgment against you for the sum of.....dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.

Dated this.....day of.....19....

A. B....., Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

| | |
|--------------|---|
| A.....B..... | } Motion for penalty against R. P., defaulting witness. Justice's Court. |
| against | |
| C.....D..... | |

.....day of.....19.... A. B., above named, appears, and, according to a notice filed and duly served on R. P., moved for the penalty of.....dollars forfeited by the said R. P. by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the.....day of.....19.... as appears by entry duly made on my docket; when and where the said R. P., a witness summoned on the part of the plaintiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf S. S., who, being duly sworn, testifies that (state what S. S. says about the condition of the water at the time). R. P., having no other evidence, closed the case on his part. Whereupon A. B. offered M. Y. as a witness, who, being sworn, testifies (state what witness says).

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion, it is adjudged, on motion of A. B., that A. B. do recover of R. P. the sum of.....dollars, penalty forfeited by reason of the premises, and the further sum of.....dollars, costs of this motion.

[No. 31.]

FORM OF A VENIRE.

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of.....county:

You are hereby directed to summon the persons named within to appear as jurors before me at my office in your county, on the.....day of.....19.... for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.

Dated this.....day of.....19....

G. W. H.....

Justice of the peace.

[No. 32.]

FORM OF JUROR'S OATH.

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

[No. 33.]

FORM OF OATH TO CONSTABLE IN CHARGE OF THE JURY.

You swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink, except such as may be ordered by the court; that you will not suffer any communication, orally or otherwise, to be made to them, and that you will not communicate with them yourself, orally or otherwise, unless by order of the court. So help you, God.

[No. 34.]

SUMMONS AGAINST DEFAULTING JUROR TO SHOW CAUSE.

State of North Carolina, to any constable or other lawful officer of.....county—Greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on the.....day of.....19.... to show cause why he, the said R. S., should not be fined according to law for his nonattendance as a juror before our said justice at his office in said county on the.....day of.....19.... in a certain cause then and there pending, in which A. B. was plaintiff and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this.....day of.....19....

G. W. H.....

Justice of the peace.

[No. 35.]

DEMURRER TO COMPLAINT.

(Title as in No. 1.)

The defendant demurs to the complaint in this action, for that the said complaint does not state facts sufficient to constitute a cause of action (or, for that the said complaint is not sufficiently explicit to enable this defendant to understand it).

(Signature of defendant or defendant's attorney.)

[No. 36.]

DEMURRER TO ANSWER.

(Title as in No. 1 or No. 5.)

The plaintiff demurs to the answer of the defendant, for that the facts stated in the answer are not legally sufficient to constitute a defense to this action (or for that the said answer is not sufficiently explicit to make this plaintiff understand it).

(Signature of plaintiff or plaintiff's attorney.)

[No. 37.]

JUDGMENT UPON DEMURRER.

NOTE.—If the justice thinks the objection raised by the demurrer to the pleadings is well founded, he will make this entry on his docket:

Demurrer to the complaint (or to the answer) filed, heard and sustained; and whereupon it is ordered that the said pleading be amended without cost (or upon payment of costs, as the case may be).

This order to amend the defective pleading is a matter of course, and is the only judgment which the justice can render upon demurrer. He can not give a final judgment in the cause at this stage, for the party may choose to amend in his pleadings and try the case on the facts. If, however, the party refuse to amend the defective pleading, the justice will disregard the same, and proceed to render final judgment, as follows:

The plaintiff (or defendant) having refused to amend his complaint (or his answer) demurred to, it is adjudged that the defendant go without day and recover of the plaintiff the sum of.....dollars, costs of this action (or that the plaintiff recover of the defendant the sum of.....dollars, damages, and the further sum of.....dollars, costs of this action).

If the justice deem the objection, raised by the demurrer, not well founded, he will enter in his docket as follows:

Demurrer to the complaint (or to the answer) filed, heard and overruled, and he will then proceed to the evidence in the cause.

NOTE—The following is offered as a general precedent of the manner in which the justice will make the entries in his docket:

[No. 38.]

(Title as in No. 1.)

.....19.... Summons issued; returnable on the.....instant at my office.

.....19.... Summons returned, served on defendant by O. P. M., constable, on the.....instant, both parties appear, the plaintiff in person, the defendant by R. H. R., Esq., attorney.

The plaintiff complains on a promissory note executed by the defendant to him, dated.....19.... payable one day after date, for \$....., and also for goods sold and delivered to the defendant, and claims damages for \$.....

The defendant answers and denies each and every allegation in the complaint, and claims a setoff of \$..... for wood sold and delivered to the plaintiff, and also of \$..... for work and labor performed for the plaintiff.

On joining issue of fact as above, the action is, by consent of parties, adjourned to the.....instant, at my office.

A venire is also issued at the plaintiff's (or defendant's) demand, returnable at the time and place last mentioned.

.....19.... The parties appear and proceed to the trial of the cause. The following jurors are returned as summoned upon the venire by O. P. M., constable. (Insert the names of all jurors summoned.) The following jurors, who are returned as summoned, do not appear. (Insert their names.) The following jurors appear according to the summons. (Insert their names.) The following jurors are sworn to try the action. (Insert their names.)

H. P. and J. M., witnesses for the plaintiff, and W. F., a witness for the defendant, are sworn and testify; J. S., a witness on the part of the defendant, is offered, but objected to by the plaintiff on the ground (state the ground) and rejected.

Having heard the evidence (and the arguments of counsel, if any), the cause is submitted to the jury, who retire, under charge of O. P. M., a constable duly sworn for that purpose, and afterwards return in open court and publicly deliver their verdict, by which they find in favor of the plaintiff for \$..... damages; whereupon, I adjudge that the plaintiff do recover of the defendant—

Damages \$.....

Costs

.....19.... Execution issued for above judgment to O. P. M., constable.

.....19.... Notice of appeal served on me by defendant; my fee paid and return to the appeal made by me.

N. B.—If the action is tried by the justice without a jury, all that relates to the venire and the verdict in the above form must be left out, and the judgment will be entered as follows:

After hearing the proofs and allegations of the respective parties, I do adjudge that the plaintiff recover, etc. (as above).

[No. 39.]

FORM OF NOTICE OF APPEAL TO THE SUPERIOR COURT, WHERE A
NEW TRIAL OF THE WHOLE MATTER IS TO BE HAD.

(Title as in No. 1.)

To G. W. H., Esq., a justice of the peace for said county.

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the.....day of.....

19.... in favor of the plaintiff for the sum of sixty-five dollars damages and

the further sum of three dollars and seventy-five cents costs, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

Dated this.....day of.....19....

W. W.....
Attorney for Appellant.

[No. 40.]

RETURN TO NOTICE OF APPEAL.

A.....B..... }
 against }
C.....D..... } County of.....

To the Superior Court of.....County:

An appeal having been taken in this action by the defendant, I, G. W. H., the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the first of February, one thousand eight hundred and sixty-nine, at the request of the plaintiff, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties personally appeared.

The plaintiff complained for goods sold and delivered to defendant to the amount of \$75. The defendant denied the right of the plaintiff to recover that amount for the goods, on the ground that he had paid, at or shortly after the purchase of said goods,dollars thereon; and he also claimed to have a setoff against the plaintiff to the amount of \$85 for board and lodging furnished to plaintiff, and work and labor done for him; and he claimed to be entitled to judgment against the plaintiff for \$.....

Both parties introduced evidence upon the claims so made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the tenth of February, eighteen hundred and sixty-nine, for \$65 damages, and for the further sum of \$3.75, costs of the action.

I also certify that on the eleventh of February, eighteen hundred and sixty-nine, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of \$1 for making my return.

All of which I send, together with the process, pleadings, and other papers in the cause.

Dated this 15th day of February, 1904.

G. W. H.....
Justice of the peace.

N. B.—If the cause was tried by a jury, state the fact and set forth the verdict, with the judgment thereon. It is not necessary to set out in the return a copy of any process, pleading, affidavit or other paper. It is sufficient to refer to such a paper as filed and as herewith sent.

[No. 41.]

WHERE THE SUM DEMANDED EXCEEDS TWO HUNDRED DOLLARS.

It appearing that the sum demanded by the plaintiff in this action exceeds two hundred dollars, it is ordered that the action be dismissed, and judgment is rendered against A. B., plaintiff, for the sum of.....dollars, costs.

(Date and sign.)

[No. 42.]

WHERE THE TITLE TO REAL ESTATE IS IN QUESTION.

N. B.—The defendant, if he wishes to make answer to title, must file a written answer to the complaint, setting for the facts.

ANSWER OF TITLE.

(Title as in No. 1.)

The defendant answers to the complaint:

1. That no allegation thereof is true.
2. That the plaintiff ought not to have or maintain his action against the defendant, because the premises mentioned and described in the complaint, at the time when the rent and render, for which said action is brought, is alleged to be due, was and is now the land and freehold of one J. D., and not that of the plaintiff; nor was the plaintiff then, nor is he now, entitled to the possession thereof; and the defendant further answers that the title to said premises was, at the time aforesaid, and is now, in said J. D., and will come in question on the trial of this action.

Dated this.....day of.....19....

C. D....., Defendant.

It appearing from the answer and proof of the defendant that the title to real estate is in controversy in this action, it is ordered that the action be dismissed, and judgment is rendered against the plaintiff for.....dollars, costs.

[No. 43.]

OFFER OF JUDGMENT.

(Title as in No. 1.)

To C. D.....:

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of fifty dollars, with costs.

Dated this.....day of.....19....

C. D....., Defendant.

[No. 44.]

ACCEPTANCE OF OFFER OF JUDGMENT.

(Title as in No. 1.)

To A. B.....:

Take notice, that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment in the above action for the sum of fifty dollars, with costs, and the justice will enter up judgment accordingly.

Dated this.....day of.....19....

A. B....., Plaintiff.

[No. 45.]

FORM OF JUDGMENT OR OFFER.

(Title as in No. 1.)

N. B.—The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows:

Whereupon, the said defendant, before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of fifty dollars with costs;* and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant in writing; said offer and acceptance thereof being filed;

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant for the sum of fifty dollars damages, and the further sum of one dollar, costs.

If notice of acceptance is not given, the entry will be as follows:

(Follow the foregoing form down to the asterisk (*) and then add):

And the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying, etc. (state the defense of the defendant down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, will be entered thus):

After hearing the proofs and allegations of the respective parties, I adjudge that the plaintiff do recover the sum of fifty dollars damages, and the further sum of one dollar, costs.

I further adjudge that the defendant do recover of the plaintiff the sum of two dollars and seventy-five cents, costs accruing in the action subsequent to the offer of the defendant referred to.

[No. 46.]

GENERAL FORM—EXECUTION.

(Title as in No. 1.)

State of North Carolina, to any constable or other lawful officer of..... county—Greeting:

Whereas, judgment has been rendered by G. W. H., Esq., a justice of the peace for said county, against C. D., in favor of A. B., for the sum of..... dollars damages, and the further sum of.....dollars costs, on the.....day of.....19....;

You are therefore commanded forthwith to levy of the goods and chattels of the said C. D. (excepting such goods and chattels as are by law exempt from execution) the amount of such judgment, with interest from the date thereof until the money is recovered.

And make due return, according to law, in sixty days from the date hereof.

Dated this.....day of.....19....

G. W. H.....
Justice of the Peace.

[No. 47.]

EXECUTION IN ATTACHMENT.

(Title as in No. 1.)

State of North Carolina, to any constable or other lawful officer of..... county—Greeting:

Whereas, in pursuance of a warrant of attachment, dated the day of 19.... issued by G. W. H., Esq., a justice of the peace of said county, in an action wherein A. B. was plaintiff and C. D. defendant, the following property of defendant was, on the day of, 19...., duly levied on and attached.

(Here insert a list of property.)

And whereas, judgment was rendered in said action, on the....day of..... in favor of said plaintiff, and against the said defendant, in the sum of..... dollars;

Therefore we command you that you satisfy the said judgment out of the property so attached as aforesaid, by the sale of the same or so much thereof as shall be sufficient to satisfy the said judgment; and if a sufficient sum be not realized therefrom, then you satisfy the said judgment out of any other goods and chattels of the said judgment debtor within your county.

And make due return thereof according to law within sixty days from the date hereof.

Witness, our said justice, this.....day of..... 19....

G. W. H.....
Justice of the Peace.

[No. 48.]

RECORD OF CONVICTION OF A CONTEMPT.

The justice will make an entry in his docket stating the particular circumstances of the contempt, of which the following is offered as an example:

Whereas, on theday of..... 19.... while engaged in the trial of an action (or other judicial act, as the case may be) in which A. B. was plaintiff and C. D. was defendant, at my office in.....county, M. B. did wilfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently towards me, and by making a loud noise did disturb the proceedings on said trial (or other judicial act) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said M. B. refused so to do, but on the contrary did publicly declare and with loud voice (state whatever offensive words were used), and whereas, when immediately called upon by me to answer for the said contempt said M. B. did not make any defense thereto, nor excuse himself therefrom; the said M. B. is therefore convicted of the contempt aforesaid, and is adjudged to pay a fine of five dollars and be imprisoned in the county jail for the term of two days, and until he pays such fine or is duly discharged from imprisonment according to law.

G. W. H.....
Justice of the Peace.

[No. 49.]

WARRANT OF COMMITMENT FOR A CONTEMPT.

(Title as in No. 1.)

State of North Carolina, to the keeper of the common jail of county—Greeting:

Whereas, etc. (recite the record of conviction so as to show the entire matter of contempt, together with the judgment therefor, and then proceed as follows):

Therefore you are hereby commanded to receive the said M. B. into your custody in the said jail, and him there safely keep during the said term of two days, and until he pays the said fine or is duly discharged according to law. Herein fail not.

Dated this.....day of.....19....

G. W. H.....
Justice of the Peace.

Code, s. 909.

NOTE. For penalty for failing to turn over books, etc., on expiration of office, see Crimes.

For criminal procedure and jurisdiction, see Criminal Procedure.

For judgment upon failure to answer, see Civil Procedure, Judgments.

CHAPTER 27.

COURTS—SUPERIOR.

| | Sections. |
|----------------------|-----------|
| I. Officers of, | 1443—1446 |
| II. Jurisdiction, | 1447—1453 |
| III. Terms of court, | 1454—1458 |
| IV. Special terms, | 1459—1466 |
| V. Practice, | 1467—1476 |
| VI. Process, | 1477—1479 |

I. OFFICERS OF.

1443. Judges to take oath of office. Every judge before he shall act as such, shall, in open court, or before the governor, or before one of the judges of the supreme or superior courts, or before some justice of the peace, take the oath appointed for public officers, and also an oath of office. The officer or court before whom said judge shall qualify, shall cause the judge to subscribe the oaths by him taken, and having certified the same, shall return said oaths to the secretary of state, who shall carefully preserve them; and if any judge shall act in his office before he shall have taken the oaths directed, he shall forfeit and pay two thousand dollars, one half to the use of the state and the other half to the person who shall sue for the same.

Code, s. 924; R. C., c. 31, ss. 18, 19; 1777, c. 115; 1806, c. 694, s. 13; 1848, c. 45.

1444. Vacancies, how filled. All vacancies occurring by death, resignation or otherwise in the offices of justice of the supreme or judge of the superior court of the state shall be filled for the unex-

pired term at the next general election for members of the general assembly held after such vacancy is created. The persons elected at such election shall be commissioned by the governor immediately after the ascertainment of the result in the manner provided by law and shall qualify and enter upon the discharge of the duties of the office within ten days after receiving such commission.

1899, c. 613.

1445-6. Power to discharge drunken solicitor. When any state solicitor, authorized by election or appointment to act as prosecuting attorney for, or in behalf of the state of North Carolina, in any of the courts of said state, shall appear at such court, in term time, drunk or intoxicated, or when it shall be brought to the knowledge of the judge presiding at such court that the solicitor, whose duty it is to represent the state at such court, is in the town in which such court is being held, drunk or intoxicated, at any time, it shall become the duty of such judge, and he is hereby directed to immediately discharge such solicitor from the duties of such court, for the term then being held, and appoint some competent attorney to act as state solicitor for said term of said court. Said appointee shall be allowed all fees and compensation belonging to the solicitor of said court.

1901, c. 717.

II. JURISDICTION.

1447. Original. The superior court shall have original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

Code, s. 922; 1889, c. 504, s. 2; Const., Art. IV, ss. 12, 27; 1866-7, c. 251; 1879, c. 92, s. 11; 1881, c. 210.

1448. In vacation or at term. In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election.

Code, c. 10, s. 230; 1871-2, c. 3.

1449. Appellate. The superior court shall have appellate jurisdiction of all issues of law or of fact, determined by a clerk of the

superior court or a justice of the peace, and of all appeals from inferior courts for error assigned, in matters of law, as provided by law.

Const., Art. IV, ss. 12, 27; Code, s. 923.

1450-1. Equity cases transferred to. All suits, petitions and other proceedings pending in the late courts of equity, and in the late courts of pleas and quarter sessions, and not determined by final judgment or decree, and all such cases wherein any act was decreed to be done or deed to be executed, and said act was not done or deed executed, may be transferred to the superior court of the county in which they were pending, at the instance of any person interested. And the superior court shall have power to make all orders, judgments and decrees as shall be necessary for finally adjudicating and settling the same.

Code, s. 944; 1871-2, c. 161; 1873-4, c. 183; 1874-5, c. 81; 1876-7, c. 9.

1452. Surveys in disputed boundaries. Whenever in any suit pending in the superior court, the bounds of lands shall be drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the bounds and lines expressed in each party's titles, and such other surveys as shall be deemed useful; which surveys shall be made by two surveyors appointed by the court, one to be named by each of the parties, or by one surveyor, if the parties agree; and the surveyors shall attend according to the order of the court, and make the surveys, and shall make as many accurate plans thereof as shall be ordered by the court; and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit.

Code, s. 939; R. C., c. 31, s. 119; 1779, c. 157; 1786, c. 252.

1453. Contiguous lands held under one survey, how. Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to have all such bodies of land included in one common survey by running around the lines of the outer tracts, and thereupon the possession of any part of said land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: Provided, that nothing in this section shall be construed to affect the rights or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner.

Code, s. 1277; 1869-70, c. 34, ss. 1, 2.

NOTE. For jurisdiction to quiet titles, see s. 1578.

For jurisdiction to sell contingent remainders, see s. 1579.

III. TERMS OF COURT.

1454. When held. A superior court shall be held by a judge thereof at the courthouse in each county. The state shall be divided into sixteen judicial districts, and the superior courts in the several counties shall be opened and held at the times hereinafter set forth, and each court shall continue in session one week, except as hereinafter provided, unless the business thereof shall be sooner disposed of, namely:

FIRST DISTRICT.

The first district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Beaufort County—Third Monday before the first Monday in March, to continue two weeks; sixth Monday after the first Monday in March, for the trial of civil cases exclusively; tenth Monday after the first Monday in March, for the trial of criminal cases exclusively; sixth Monday after the first Monday in September, to continue two weeks, the second week for the trial of civil cases exclusively; thirteenth Monday after the first Monday in September, to continue three weeks, the last two weeks for the trial of civil cases exclusively. The board of commissioners of the county of Beaufort is hereby authorized not to draw a jury for the second and third weeks, or for either of the December terms of the superior court herein provided for, when in their opinion the business of the court does not require it.

Currituck County—First Monday before the first Monday in March; first Monday in September.

Camden County—First Monday in March; first Monday after the first Monday in September.

Pasquotank County—First Monday after the first Monday in March, to continue two weeks; twelfth Monday after the first Monday in March, to continue two weeks, the last week for the trial of civil cases exclusively; second Monday after the first Monday in September; twelfth Monday after the first Monday in September.

Perquimans County—Third Monday after the first Monday in March and September.

Chowan County—Fourth Monday after the first Monday in March and September.

Gates County—Fifth Monday after the first Monday in March and September.

Washington County—Seventh Monday after the first Monday in March; eighth Monday after the first Monday in September.

Tyrrell County—Eighth Monday after the first Monday in March; ninth Monday after the first Monday in September.

Hyde County—Ninth Monday after the first Monday in March; eleventh Monday after the first Monday in September.

Dare County—Eleventh Monday after the first Monday in March; tenth Monday after the first Monday in September.

1901, c. 28, s. 1; c. 29, s. 2; 1903, c. 685.

SECOND DISTRICT.

The second district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Halifax County—Fifth Monday before the first Monday in March, to be for the trial of criminal cases exclusively, and to continue for one week; first Monday in March; the thirteenth Monday after the first Monday in March; the second Monday before the first Monday in September; twelfth Monday after the first Monday in September. The four terms last mentioned each to continue for two weeks.

Northampton County—Sixth Monday before the first Monday in March, to be for the trial of civil actions exclusively, except jail cases on the criminal docket, and to continue one week; third Monday after the first Monday in March, to continue two weeks; first Monday in August, to be for the trial of civil cases exclusively, except jail cases on the criminal docket, to continue one week; the eighth Monday after the first Monday in September, to continue two weeks.

Warren County—Third Monday before the first Monday in March; fifteenth Monday after the first Monday in March; the second Monday after the first Monday in September, to continue for two weeks.

Bertie County—Second Monday before the first Monday in March, and the first Monday after the first Monday in September, each to be for the trial of civil cases exclusively, except jail cases on the criminal docket; eighth Monday after the first Monday in March, to continue for two weeks; tenth Monday after the first Monday in September, to continue for two weeks.

Hertford County—Seventh Monday after the first Monday in March; seventh Monday after the first Monday in September; third Monday before the first Monday in September, which shall be for the trial of criminal cases exclusively; first Monday before the first Monday in March.

1901, c. 28, s. 1; 1901, c. 29, s. 3; 1903, c. 15, s. 2; 1903, c. 24, s. 1; 1903, c. 701, ss. 1, 2.

THIRD DISTRICT.

The third district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Pitt County—Seventh Monday before the first Monday in March; seventh Monday after the first Monday in March, each to continue for two weeks; second Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively; second Monday after the first Monday in September and the ninth Monday after the first Monday in September, each for two weeks, and the last named term to be for the trial of civil cases only.

Craven County—Third Monday before the first Monday in March, for the trial of civil cases exclusively; ninth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively; fifth Monday after the first Monday in March, for the trial of criminal cases exclusively; fourth Monday after the first Monday in September and the eleventh Monday after the first Monday in September, each to continue for two weeks.

Greene County—First Monday before the first Monday in March; first Monday in September; thirteenth Monday after the first Monday in September, the last named term to continue for two weeks.

Carteret County—First Monday after the first Monday in March, and sixth Monday after the first Monday in September.

Jones County—Fourth Monday after the first Monday in March, and eighth Monday after the first Monday in September.

Pamlico County—Sixth Monday after the first Monday in March; seventh Monday after the first Monday in September.

1901, c. 28, s. 1; 1903, c. 294.

FOURTH DISTRICT.

The fourth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Franklin County—Sixth Monday before the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March and September, each to continue for two weeks.

Wilson County—Fourth Monday before the first Monday in March, to continue for two weeks, the second week to be for the trial of civil cases exclusively; tenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases exclusively; tenth Monday after the first Monday in March, first Monday in September and fourteenth Monday after the first Monday in September, each for the trial of criminal cases exclusively.

Vance County—Eleventh Monday after the first Monday in March; fourth Monday after the first Monday in September, to continue for two weeks; second Monday before the first Monday in March, to continue for two weeks.

Edgecombe County—First Monday in March, and first Monday after the first Monday in September; fourth Monday after the first Monday in March and eighth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively.

Martin County—Second Monday after the first Monday in March and September, each to continue for two weeks.

Nash County—Eighth Monday after the first Monday in March and twelfth Monday after the first Monday in September, each to continue for two weeks; first Monday after the first Monday in March and first Monday before the first Monday in September. At the two last named terms, no civil suit shall stand for trial except divorce cases and appeals from justices' judgments: Provided, that this shall not prevent the submission of any issue to the jury by consent, or where there is no objection thereto.

1901, c. 28, s. 1; 1901, c. 29, ss. 5, 6; 1903, c. 6; 1903, c. 636; 1903, c. 736.

FIFTH DISTRICT.

The fifth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

New Hanover County—The sixth Monday before the first Monday in March, to continue one week; fifth Monday before the first Monday in March, to continue two weeks; fourth Monday after the first Monday in March, to continue one week; fifth Monday after the first Monday in March, to continue two weeks; twelfth Monday after the first Monday in March, to continue one week; sixteenth Monday after the first Monday in March, to continue one week; third Monday after the first Monday in September, to continue one week; sixth Monday after the first Monday in September, to continue for two weeks; twelfth Monday after the first Monday in September, to continue one week.

Pender County—The eighth Monday before the first Monday in March, to continue one week; first Monday before the first Monday in March, to continue one week; first Monday in September, to continue one week.

Duplin County—The seventh Monday before the first Monday in March; first Monday after the first Monday in March; first Monday before the first Monday in September; eighth Monday after the first Monday in September, to continue for two weeks.

Onslow County—The seventh Monday after the first Monday in

March; thirteenth Monday after the first Monday in September, to continue for two weeks.

Sampson County—The third Monday before the first Monday in March; eighth Monday after the first Monday in March, fourth Monday after the first Monday in September, each to continue two weeks.

Lenoir County—Second Monday after the first Monday in March, fourteenth Monday after the first Monday in March, first Monday after the first Monday in September, tenth Monday after the first Monday in September, each to continue two weeks.

1903, c. 533, s. 1; 1901, c. 28, s. 1.

SIXTH DISTRICT.

The sixth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wake County—Eighth Monday before the first Monday in March; third Monday after the first Monday in March; eighth Monday before the first Monday in September; third Monday after the first Monday in September, each to continue for two weeks, for the trial of criminal and civil cases; first Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively; seventh Monday after the first Monday in March, to continue for three weeks, for the trial of civil cases exclusively; seventh Monday after the first Monday in September, to continue for three weeks, for the trial of civil cases exclusively: Provided, the civil docket shall not be called before Monday of the second week of the terms of court designated for the trial of civil and criminal cases; except that any case may be tried during the first week by consent. Should the criminal business be earlier disposed of it shall be the duty of the judge to attend the second week for the trial of the civil calendar.

Wayne County—Sixth Monday before the first Monday in March; first Monday after the first Monday in September, each to continue for two weeks; sixth Monday after the first Monday in March; twelfth Monday after the first Monday in September, each to continue one week.

Harnett County—Fourth Monday before the first Monday in March, to continue for two weeks; eleventh Monday after the first Monday in March, to continue for one week; first Monday before the first Monday in September, to continue for one week; tenth Monday after the first Monday in September, to continue for two weeks.

Johnston County—First Monday after the first Monday in March and thirteenth Monday after the first Monday in September, each to continue for two weeks; first Monday in September, to continue for one week.

1901, c. 28; 1903, c. 534.

SEVENTH DISTRICT.

The seventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Columbus County—First Monday before the first Monday in March; sixth Monday after the first Monday in March, to continue two weeks; first Monday in September; twelfth Monday after the first Monday in September.

Cumberland County—Seventh Monday before the first Monday in March, eighth Monday after the first Monday in March, first Monday before the first Monday in September, eleventh Monday after the first Monday in September, each for the trial of criminal cases exclusively; ninth Monday after the first Monday in March, and seventh Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively; second Monday before the first Monday in March, for the trial of civil cases exclusively.

Robeson County—Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases exclusively; sixth Monday before the first Monday in September, for the trial of criminal cases exclusively; ninth Monday after the first Monday in September, to continue for two weeks, for the trial of criminal cases exclusively; fourth Monday after the first Monday in March, and first Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively; eleventh Monday after the first Monday in March and thirteenth Monday after the first Monday in September, for the trial of civil cases exclusively.

Bladen County—First Monday in March, and fifth Monday after the first Monday in September, each to continue for two weeks.

Brunswick County—Third Tuesday after the first Monday in March, and fourth Tuesday after the first Monday in September.

1901, c. 28, s. 1; 1903, c. 572, c. 607.

EIGHTH DISTRICT.

The eighth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Anson County—First Monday after the first Monday in February, and the second Monday after the last Monday in August, each for the trial of criminal cases exclusively; tenth Monday after the first Monday in February; sixth Monday after the last Monday in August, this last term to continue for two weeks, and to be for the trial of civil cases exclusively; sixteenth Monday after the first Monday in February for the trial of civil cases exclusively.

Chatham County—The first Monday in February; thirteenth Monday after the first Monday in February; third Monday before the last Monday in August, for the trial of civil cases exclusively; eleventh Monday after the last Monday in August.

Moore County—The second Monday before the first Monday in February, to continue for two weeks, for the trial of civil cases exclusively; the eleventh Monday after the first Monday in February, for the trial of criminal cases exclusively; the fourteenth Monday after the first Monday in February, to continue for two weeks, for the trial of civil cases exclusively; the second Monday before the last Monday in August, for the trial of criminal cases exclusively; the third Monday after the last Monday in August, for the trial of civil cases exclusively; the twelfth Monday after the last Monday in August, for the trial of criminal cases exclusively.

Richmond County—The fourth Monday after the first Monday in February, for the trial of criminal cases exclusively; the eighth Monday after the first Monday in February, for the trial of civil cases exclusively, and to continue two weeks; the first Monday after the last Monday in August, for the trial of criminal cases exclusively; the fourth Monday after the last Monday in August, to continue two weeks.

Scotland County—The fifth Monday after the first Monday in February, for the trial of civil cases exclusively; the twelfth Monday after the first Monday in February, for the trial of criminal cases exclusively; the eighth Monday after the last Monday in August, for the trial of civil cases exclusively; the thirteenth Monday after the last Monday in August, for the trial of criminal cases exclusively.

Union County—The third Monday before the first Monday in February, for the trial of criminal cases exclusively; the second Monday after the first Monday in February, to continue two weeks, for the trial of civil cases exclusively; the sixth Monday after the first Monday in February, for the trial of criminal cases exclusively; the fourth Monday before the last Monday in August, for the trial of criminal cases exclusively; the first Monday before the last Monday in August, to continue two weeks, for the trial of civil cases exclusively; the ninth Monday after the last Monday in August, to continue two weeks, for the trial of criminal cases exclusively.

1903, c. 25, s. 1; 1903, c. 259, ss. 1, 2; 1901, c. 28, s. 1.

NINTH DISTRICT.

The ninth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Durham County—Eighth Monday before the first Monday in

March; tenth Monday after the first Monday in March; the first Monday before the first Monday in September, and the thirteenth Monday after the first Monday in September, each for the trial of criminal cases exclusively; sixth Monday before the first Monday in March; second Monday after the first Monday in March; fourth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively.

Guilford County—Seventh Monday before the first Monday in March; ninth Monday after the first Monday in March; second Monday before the first Monday in September, and seventh Monday after the first Monday in September, each for the trial of criminal cases exclusively; third Monday before the first Monday in March; fourteenth Monday after the first Monday in March; second Monday after the first Monday in September, and fourteenth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively; eighth Monday after the first Monday in September and sixth Monday after the first Monday in March, each for the trial of civil cases exclusively.

Granville County—Fourth Monday before the first Monday in March, to continue one week; seventh Monday after the first Monday in March, to continue for two weeks; fifth Monday before the first Monday in September, to continue one week; eleventh Monday after the first Monday in September, to continue for two weeks.

Alamance County—First Monday before the first Monday in March, to continue for two weeks; twelfth Monday after the first Monday in March, for the trial of civil cases exclusively; first Monday in September, to continue for two weeks, for the trial of civil cases exclusively; ninth Monday after the first Monday in September, for the trial of criminal cases exclusively.

Orange County—First Monday after the first Monday in March; fourth Monday before the first Monday in September, and sixth Monday after the first Monday in September; eleventh Monday after the first Monday in March, for the trial of civil cases exclusively.

Person County—Fifth Monday after the first Monday in March; thirteenth Monday after the first Monday in March, for the trial of civil cases only; third Monday before the first Monday in September, and tenth Monday after the first Monday in September.

1901, c. 28, s. 1; 1903, c. 198.

TENTH DISTRICT.

The tenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Montgomery County—Sixth Monday before the first Monday in March, for the trial of criminal cases exclusively; sixth Monday after

the first Monday in March, for the trial of civil cases exclusively; third Monday after the first Monday in September, to continue for two weeks.

Iredell County—Fifth Monday before the first Monday in March; eleventh Monday after the first Monday in March; fourth Monday before the first Monday in September; ninth Monday after the first Monday in September, each to continue for two weeks.

Rowan County—Third Monday before the first Monday in March; ninth Monday after the first Monday in March; first Monday in September, and eleventh Monday after the first Monday in September, each to continue for two weeks, the civil docket not to be called at the May and November terms until the second week.

Davidson County—First Monday before the first Monday in March, and the second Monday before the first Monday in September, each to continue two weeks; seventh Monday after the first Monday in March, for the trial of civil cases exclusively.

Stanly County—First Monday after the first Monday in March, and second Monday after the first Monday in September, each for the trial of civil cases exclusively; seventh Monday before the first Monday in September, and fifteenth Monday after the first Monday in September, each for the trial of criminal cases exclusively.

Randolph County—Second Monday after the first Monday in March; sixth Monday before the first Monday in September, and thirteenth Monday after the first Monday in September, each to continue for two weeks.

Davie County—Fourth Monday after the first Monday in March, and fifth Monday after the first Monday in September, each to continue for two weeks.

Yadkin County—Eighth Monday after the first Monday in March; seventh Monday after the first Monday in September, to continue for two weeks.

1901, c. 28, s. 1; 1903, c. 96, s. 1; 1901, c. 29, s. 10.

ELEVENTH DISTRICT.

The eleventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Forsyth County—Third Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases exclusively; sixth Monday before the first Monday in September, and fifth Monday after the first Monday in September, each for the trial of criminal cases exclusively; eleventh Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in March; first Monday after the first Monday

in September, and thirteenth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively.

Wilkes County—Fifth Monday before the first Monday in March, to continue for one week for the trial of criminal cases only. Thirteenth Monday after the first Monday in March to continue for one week for the trial of civil cases only. Fourth Monday before the first Monday in September, to continue for two weeks for the trial of criminal cases and for the hearing of motions on the civil docket not requiring a jury. Seventh Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only.

Rockingham County—The first Monday before the first Monday in March, the ninth Monday after the first Monday in September, each to continue two weeks and for the trial of all civil and criminal cases; the thirteenth Monday after the first Monday in March, to continue two weeks and for the trial of civil cases only, at which term it shall only be required to have eighteen jurors summoned; the fifth Monday before the first Monday in September, to continue one week, and for the trial of criminal cases only.

Alleghany County—Third Monday after the first Monday in March, and second Monday before the first Monday in September.

Caswell County—Sixth Monday after the first Monday in March and September.

Surry County—Seventh Monday after the first Monday in March, to continue for one week and for the trial of criminal cases only; eighth Monday after the first Monday in March, to continue for one week and for the trial of civil cases only; first Monday before the first Monday in September, for the trial of civil cases only, and to continue for two weeks; eleventh Monday after the first Monday in September, to continue for one week, and for the trial of criminal cases only; the twelfth Monday after the first Monday in September, to continue for one week, and for the trial of civil cases only.

Stokes County—Ninth Monday after the first Monday in March, and third Monday after the first Monday in September, each to continue for two weeks.

1901, c. 28, s. 1; 1903, c. 313, s. 1; 1903, c. 464; 1903, c. 656.

TWELFTH DISTRICT.

The twelfth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Mecklenburg County—On the third Monday before the first Monday in March, and on the third Monday before the first Monday in September, each of said terms to continue for two weeks; also on

the seventh Monday after the first Monday in March, on the thirteenth Monday after the first Monday in March, on the third Monday after the first Monday in September, and on the thirteenth Monday after the first Monday in September, each of said terms to continue for one week, which shall be for the trial of criminal actions only. For the trial of civil actions only, on the seventh Monday before the first Monday in March, on the first Monday after the first Monday in March, on the seventh Monday before the first Monday in September, each of said terms to continue for two weeks; also on the eighth Monday after the first Monday in March, on the fourteenth Monday after the first Monday in March, on the twelfth Monday after the first Monday in September, each of said terms to continue for one week; also, on the fourth Monday after the first Monday in September, to continue for three weeks. No process nor other writ of any kind, pertaining to civil actions, shall be made returnable to any of the criminal terms, and no business pertaining to civil actions shall be transacted at the criminal terms for Meeklenburg county. At the first fall and spring terms of the criminal courts held for each year grand juries shall be drawn, and the presiding judge shall charge them as provided by law, and such grand juries shall serve during the remaining fall and spring terms respectively.

Cleveland County—Third Monday after the first Monday in March; fifth Monday before the first Monday in September and ninth Monday after the first Monday in September, each to continue for two weeks.

Gaston County—First Monday before the first Monday in March, and first Monday after the first Monday in September, each to continue for two weeks; eleventh Monday after the first Monday in March, to continue for two weeks, and eleventh Monday after the first Monday in September. There shall be drawn and charged a grand jury at the first term held in the spring and fall respectively, which shall serve at the succeeding spring and fall terms.

Lincoln County—Fifth Monday after the first Monday in March, to continue for two weeks; first Monday in September, and fourteenth Monday after the first Monday in September.

Cabarrus County—Fifth Monday before the first Monday in March; ninth Monday after the first Monday in March, and seventh Monday after the first Monday in September, each to continue for two weeks; first Monday before the first Monday in September.

1901, c. 28, s. 1; 1903, c. 177, ss. 1, 4; 1903, c. 469.

THIRTEENTH DISTRICT.

The thirteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Catawba County—Fourth Monday before the first Monday in March, to continue for two weeks, the first week for the trial of criminal cases only, the second week for the trial of civil cases only; ninth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively; eighth Monday before the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases; eighth Monday after the first Monday in September, to continue for two weeks, the first week for the trial of criminal cases only, the second week for the trial of civil cases only.

Alexander County—Second Monday before the first Monday in March, and fourth Monday after the first Monday in September.

Caldwell County—First Monday before the first Monday in March; second Monday after the first Monday in September, for the trial of criminal cases only, and twelfth Monday after the first Monday in September, for the trial of civil cases exclusively, each to continue for two weeks.

Mitchell County—Eleventh Monday after the first Monday in March, and tenth Monday after the first Monday in September, each to continue two weeks.

Watauga County—Third Monday after the first Monday in March, and fourth Monday before the first Monday in September, each to continue for two weeks; thirteenth Monday after the first Monday in March.

Ashe County—Fifth Monday after the first Monday in March; sixth Monday before the first Monday in September, and fifth Monday after the first Monday in September, each to continue for two weeks.

1901, c. 28, s. 1; 1901, c. 29, ss. 11, 15; 1903, cc. 231, 282, 629; 1901, c. 29, ss. 13, 14.

FOURTEENTH DISTRICT.

The fourteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Yancey County—Seventh Monday after the first Monday in March, to continue for three weeks; thirteenth Monday after the first Monday in September, to continue for two weeks.

McDowell County—Second Monday before the first Monday in March; fourth Monday before the first Monday in September, and seventh Monday after the first Monday in September, each to continue for two weeks.

Henderson County—First Monday in March, for the trial of criminal cases exclusively, one week; tenth Monday after the first Monday in March, and ninth Monday after the first Monday in September,

ber, each to continue for two weeks, for the trial of civil cases exclusively, except jail cases on the criminal docket; second Monday after the first Monday in September, to continue for two weeks, for the trial of criminal cases exclusively.

Rutherford County—First Monday after the first Monday in March; first Monday in September, for the trial of civil cases only; and eleventh Monday after the first Monday in September, each to continue for two weeks.

Polk County—Third Monday after the first Monday in March, to continue for two weeks; fourth Monday after the first Monday in September.

Burke County—The fifth Monday after the first Monday in March, and the thirteenth Monday after the first Monday in September, each to continue for two weeks, and to be for the trial of both criminal and civil cases, and there shall be a grand jury at each of said terms; and on the thirteenth Monday after the first Monday in March and the fifth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively, and there shall be no grand jury at either of said terms.

1901, c. 28, s. 1; 1903, cc. 588, 722; 1901, c. 29, s. 19.

FIFTEENTH DISTRICT.

The fifteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Buncombe County—Fourth Monday before the first Monday in March, to continue for three weeks, for the trial of criminal cases exclusively; seventh Monday after the first Monday in March, fifth Monday before the first Monday in September, and tenth Monday after the first Monday in September, each to continue for two weeks, for the trial of criminal cases exclusively; first Monday after the first Monday in March, to continue for four weeks, for the trial of civil cases exclusively; twelfth Monday after the first Monday in March, to continue for four weeks, for the trial of civil cases exclusively; first Monday after the first Monday in September, to continue for six weeks, for the trial of civil cases exclusively; thirteenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases exclusively. The board of commissioners of Buncombe county may, for good cause, decline to draw a jury for the last two weeks of the six weeks' fall term, and for the last week of the two four week terms.

Madison County—On the sixth Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively. On the first Monday before the first Monday in March,

to continue for two weeks, for the trial of criminal cases exclusively. On the ninth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases exclusively; on the third Monday before the first Monday in September, to continue for two weeks, for the trial of criminal cases exclusively; and on the seventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases exclusively.

Transylvania County—Fifth Monday after the first Monday in March, and the first Monday before the first Monday in September, each to continue for two weeks; twelfth Monday after the first Monday in September.

1901, c. 28, s. 1; 1903, cc. 84, 495; 1901, c. 29, s. 16.

SIXTEENTH DISTRICT.

The sixteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Haywood County—Fourth Monday before the first Monday in March; ninth Monday after the first Monday in March, and third Monday after the first Monday in September, each to continue for two weeks.

Jackson County—Second Monday before the first Monday in March, for the trial of criminal cases only; eleventh Monday after the first Monday in March, for the trial of civil cases only, and fifth Monday after the first Monday in September, each to continue two weeks. The board of commissioners of Jackson county may, when the public interest requires it, decline to draw a grand jury for the term to be held on the eleventh Monday after the first Monday in March: Provided, that the court to be held in said county on the second Monday before the first Monday in March shall be a return term for civil process and for the hearing of motions on the civil docket: Provided further, that civil cases requiring a jury may be tried at said term by consent of the parties thereto.

Swain County—First Monday in March, sixth Monday before the first Monday in September, and seventh Monday after the first Monday in September, each to continue for two weeks: Provided, that the board of county commissioners of Swain county may, when the public interest requires it, decline to draw a grand jury for the July term.

Graham County—Second Monday after the first Monday in March, and first Monday in September, each to continue for two weeks.

Cherokee County—Fourth Monday after the first Monday in March; fourth Monday before the first Monday in September, and

ninth Monday after the first Monday in September, each to continue for two weeks.

Clay County—Sixth Monday after the first Monday in March and second Monday after the first Monday in September.

Macon County—Seventh Monday after the first Monday in March, and eleventh Monday after the first Monday in September, each to continue for two weeks. The board of commissioners of Macon county may, for good cause, decline to draw a jury for more than one week for any term of court provided for in this chapter.

1901, c. 28, s. 1; 1901, c. 29, ss. 17, 18; 1903, cc. 92, 293, 635.

1455. Civil process and motions at criminal terms. Civil process shall be returnable to, and pleadings filed at, all of the courts designated by law as exclusively criminal; motions in civil actions may be heard upon due notice at such criminal terms; and trial in civil actions which do not require a jury may be heard at such criminal terms, by consent.

1901, c. 28, s. 2.

1456. No grand jury drawn nor criminal process returnable to or solicitors attend, civil terms. No grand juries shall be drawn for the terms of court designated by law as being for the trial of civil cases exclusively, and the solicitors shall not be required to attend nor be entitled to their certificates for attendance upon any exclusively civil terms, unless there are cases on the civil docket in which they officially appear, and no criminal process shall be returnable to any term designated in this chapter for the trial of civil actions alone: Provided, this section shall not apply to Mecklenburg county.

1901, c. 28, ss. 3, 7.

1457. Rotation of judges. The judges of the superior court shall hold the courts of the several judicial districts successively, according to the following order and system: The judge of each judicial district shall hold the courts of the fall circuit for the year one thousand nine hundred and one in the district of which he is the judge, and successively thereafter he shall hold the courts of the several judicial districts in the order of their numbers, district number one following district number sixteen. The judge riding any spring circuit shall hold all the courts which fall between January and June, both inclusive, and the judge riding any fall circuit shall hold all the courts which fall between July and December, both inclusive.

Code, s. 911; 1901, c. 28, ss. 4, 9; R. C., c. 31, s. 20; 1876-7, c. 27; 1879, c. 11; 1885, c. 180; Const., Art. IV, s. 11.

1458. Court adjourned by sheriff when judge not present. If the judge of a superior court shall not be present to hold any term of a court at the time fixed therefor, he may order the sheriff to

adjourn said court to any day certain during said term, and on failure to hear from said judge it shall be the duty of the sheriff to adjourn the court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the judge from any cause can not hold the term. If by sunset on the fourth day the judge shall not appear to hold the term, or if the sheriff shall be sooner advised that the judge can not hold the term, it shall then be the duty of the sheriff to adjourn the court until the next term.

Code, s. 926; 1901, c. 269; 1887, c. 13.

IV. SPECIAL TERMS.

1459. What judge holds; exchange of courts. The governor shall have power to appoint any judge to hold special terms of the superior court in any county, and, by consent of the governor, the judges may exchange the courts of a particular county or counties; but no judge shall be assigned to hold the courts of any district oftener than once in four years; and whenever a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor.

Code, s. 913; R. C., c. 31, s. 20; 1879, c. 11; Const., Art. IV, s. 11.

1460. How ordered. Whenever it shall appear to the governor by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that there is such an accumulation of criminal or civil actions in the superior court of any county as to require the holding of a special term for its dispatch, he shall issue an order to the judge of the judicial district, in which such county is, or to any other judge of the superior court, requiring him to hold a special term of the superior court for such county, to begin on a certain Monday, not to interfere with any of the regular terms of the courts of his district and hold for such time as he may designate, unless the business be earlier disposed of. The judge shall attend and hold such court, without extra compensation, except his actual expenses to be paid by the county in which the special term is held.

Code, s. 914; 1901, c. 167; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44.

1461. Notice of. Whenever the governor shall call a special term of the superior court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause persons to be drawn and summoned as jurors for said term; and also to advertise said term at the courthouse and at one public place in every township of his county, or by publication of at least two weeks in some news-

paper published in his county in lieu of such township advertisement.

Code, s. 915; 1868-9, c. 273.

1462. Certificate of attendance; compensation. The clerk shall give the judge a certificate of attendance for the number of days occupied by the court, and the judge shall thereupon be entitled to receive his actual expenses from the commissioners of the county in which the court is held.

Code, s. 918; 1901, c. 167; 1868-9, c. 273.

1463. Grand juries for. There shall be no grand jury at any special term, unless the same shall be ordered by the governor.

Code, s. 921; 1868-9, c. 273.

1464. Jurisdiction. The special terms of the superior court held in pursuance of this chapter shall have all the jurisdiction and powers that regular terms of the superior court have.

Code, s. 916; 1868-9, c. 273.

1465. All persons must attend; process not returnable to. All persons and witnesses summoned at the regular or special term, and officers or others who may be bound to attend the next regular term of the court, shall attend the special term, under the same rules, forfeitures and penalties as if the term were a regular term. But no process shall be made returnable thereto except subpœnas, or other process for the attendance of witnesses.

Code, s. 919; R. C., c. 31, s. 23; 1844, c. 10; 1848, c. 29.

1466. Subpœnas returnable to. Subpœnas may issue returnable on any day of any special term.

Code, s. 920; 1868-9, c. 273.

V. PRACTICE.

1467. Minutes read each morning. Every morning during the term the judge presiding shall order the reading of the minutes of said court for the day preceding, and the minutes of the last day shall be read immediately preceding the final adjournment of said term.

Code, s. 925; 1861, c. 3.

1468. Nonsuit not allowed after verdict. In actions where a verdict shall pass against the plaintiff, judgment shall be entered against him.

Code, s. 936; R. C., c. 31, s. 110; 2 Hen. IV., c. 7.

1469. Suit for penalty, plaintiff may reply fraud to plea of release. If an action be brought in good faith by any person to recover a penalty under a law of this state, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin, whether before action brought or after, shall be in anywise available or effectual.

Code, s. 932; R. C., c. 31, s. 100; 4 Hen. VII., c. 20.

1470. Suit on bonds; defendant may plead satisfaction. When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manner than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or defeasance of such bond, though such payment were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded.

Code, s. 933; R. C., c. 31, s. 101; 4 Hen. VII., c. 20.

1471. Sum due with interest and costs, discharges penalty of bonds. If at any time, pending an action on any bond with a penalty, the defendant shall bring into court, where the action shall be pending, all the principal money and interest due, and also all such costs as have been expended in any suit upon such bond, the said

money shall be deemed and taken to be in full satisfaction and discharge of said bond, and the court shall give judgment accordingly.

Code, s. 934; R. C., c. 31, s. 102; 4 Anne, c. 16.

1472. Proceeds of judicial sales collected on motion. The supreme and other courts ordering a judicial sale, or having possession of the bonds which may have been taken on such sale, may, on motion, after ten days' notice thereof in writing, enter judgment as soon as the money may become due against the debtors or any of them, unless for good cause shown the court shall direct some other mode of collection.

Code, s. 941; R. C., c. 31, s. 129.

1473. Judicial sale confirmed, purchaser deemed owner. Any person let into possession under any judicial sale confirmed, where the title may be retained as a security for the price, shall be deemed the legal owner of the premises for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession taken or continued, in the same manner as if the title had been conveyed to him on the day of sale, unless restrained by some order of the court directing the sale; and the suit so brought shall be under the control of the court ordering the sale.

Code, s. 942; 1858-9, c. 50.

1474. Procedure after appeal. In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if said judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause shall stand in its regular order on the docket for trial at such first term after the receipt of the certificate from the supreme court.

1887, c. 192, s. 2.

1475. Officer attending juries sworn. When any officer (except such as are appointed to attend the grand jury) shall be appointed or summoned to attend any superior court, the clerk, at the time of the first going out of a jury on the trial of any civil or criminal action, shall administer an oath to such officer, faithfully to attend the several juries that may be put under his care during that term, that shall be charged in the trial of any civil or criminal action; and after such officer shall be once so sworn, he shall be considered to all intents and purposes as acting upon the same oath while attending every jury, that he may be called to attend during that term.

Code, s. 927; R. C., c. 31, s. 36; 1801, c. 592.

1476. Quakers may wear hats in court. The people called Quakers may wear their hats in courts of judicature, as elsewhere, according to the custom of their sect.

Code, s. 943; R. C., c. 31, s. 131; 1784, c. 209.

VI. PROCESS.

1477. Return on notice, evidence. When a notice shall issue to the sheriff, his return thereon that the same has been executed shall be deemed sufficient evidence of the service thereof.

Code, s. 940; R. C., c. 31, s. 123; 1799, c. 537.

1478. When directed to officer of adjoining county. If at any time there should not be in the county a proper officer to whom precepts or process, original, mesne or final, of a court of record, shall or ought to be directed, who can lawfully execute the same; or if there be such officer who shall refuse or neglect to execute such precept or process, then the clerk of the court from which the same hath issued or shall issue, upon the facts being verified before him by written affidavit, subscribed by the plaintiff or his agent, shall issue such precept or process to the sheriff of any adjoining county, who shall have power to execute, and shall execute the same, in like manner as if he were sheriff of the county.

Code, s. 929; R. C., c. 31, s. 55; 1879, c. 156; 1821, c. 1080; 1822, c. 1132; 1846, c. 61.

1479. Sheriff interested and no coroner, issues to officer of adjoining county. In all cases where the sheriff of any county shall be interested, if there is no coroner in said county, process may be issued to and shall be executed by the sheriff of any adjoining county.

Code, s. 930; 1869-70, c. 175.

CHAPTER 28.

COURTS—SUPREME.

| | Sections. |
|-----------------------|-----------|
| I. How and when held, | 1480—1484 |
| II. Practice in, | 1485—1498 |
| III. Officers of, | 1499—1502 |

I. HOW AND WHEN HELD.

1480. How constituted. The supreme court shall consist of a chief justice and four associate justices.

Const., Art. IV, s. 6.

1481. Justices to take oath of office. The justices, before they act as such, shall, before the governor or some judicial officer, take and subscribe the oaths appointed for the qualification of public officers, and also an oath of office, which shall be certified by the officer taking the same and delivered to the secretary of state, to be safely kept.

Code, s. 955; R. C., c. 33, s. 3; 1818, c. 963.

1482. Quorum. Three justices shall constitute a quorum for the transaction of the business of the court.

Code, s. 956; 1889, c. 230.

1483. Convenes, when. There shall be held at the seat of government of the state in each year two terms of the supreme court, commencing on the first Monday in February and the last Monday in August.

Code, s. 953; 1901, c. 660; 1887, c. 49; 1881, c. 178.

1484. Sits until business is dispatched; name of court; adjourned if no justice present first week. The court shall sit at each term until all the business on the docket shall be determined or continued on good cause shown. The court shall bear the name and style of "The Supreme Court of North Carolina," and shall be a court of record; and the papers and records belonging to the clerk's office thereof shall be constantly kept within the city of Raleigh: Provided, that in case no one of the justices shall attend the term during the first week thereof, at the end of that time the court shall stand adjourned till the next term, and the causes on the docket be continued.

Code, s. 954; R. C., c. 33, s. 2; 1804, c. 660; 1805, c. 674; 1818, c. 962; 1828, c. 13; 1842, c. 15; 1846, cc. 28, 29.

II. PRACTICE IN.

1485. Original jurisdiction, claims against state. The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action.

Const., Art. IV, s. 9.

1486. Manner of prosecuting claims against the state. Any person having any claim against the state may file his complaint in the office of the clerk of the supreme court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the governor, and therein request him to appear on behalf of the state and answer his claim. The copy shall be

served at least twenty days before application for relief shall be made to the court. In case of an appearance for the state by the governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the supreme court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the supreme court. If the state shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The supreme court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the general assembly at its next term.

Code, s. 948.

1487. Jurisdiction as court of review. The supreme court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over "issues of fact" and "questions of fact" shall be the same exercised by it before the adoption of the constitution of one thousand eight hundred and sixty-eight, and the court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts.

Const., Art. IV, s. 8.

1488. How cases taken to. Cases shall be taken to the supreme court by appeal, as provided by law.

Code, s. 946.

1489. May make rules of court. The justices of the supreme court shall prescribe and establish from time to time rules of practice for that court and also for the superior courts. The clerk shall certify to the judges of the superior court the rules of practice for said court, to be entered on the records thereof in each county.

Code, s. 961; R. C., c. 33, s. 13; 1818, c. 963.

1490. Judgment on record; execution, where returnable. In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; and it may at its discretion make the writs of execution which it may issue returnable either to the said court, or to the superior court: Provided, that when an execution shall be made returnable as last mentioned, a certificate of the

final judgment of the supreme court shall always be transmitted to the superior court aforesaid, and there be recorded: Provided further, that the said superior court may enforce obedience to the execution, and in the event of its not being executed may issue new or further execution or process thereon in the same manner as though the first execution had issued from the said superior court: Provided also, that in criminal cases the decision of the supreme court shall be certified to the superior court from which the case was transmitted, which superior court shall proceed to judgment and sentence agreeable to the decision of the supreme court and the laws of the state.

Code, s. 957; R. C., c. 33, s. 6; 1799, c. 520; 1818, c. 963; 1830, c. 2; 1868-9, c. 962.

1491. Appeals dismissed, when. Suits and appeals pending in the supreme court may be dismissed on failure to prosecute the same, after a rule obtained for that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the costs of the plaintiff or appellant, or proceed to hear and determine it.

Code, s. 967; R. C., c. 33, s. 20; 1848, c. 28; Supm. Ct. Rules, 15, et seq.

1492. No judgment on interlocutory order; opinion certified below. When an appeal shall be taken to the supreme court from any interlocutory judgment, the supreme court shall not enter any judgment reversing, affirming or modifying the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the court below, with instructions to proceed upon such order, judgment or decree, or to reverse or modify the same according to said opinion, and the court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions.

Code, s. 962.

1493. Power over amendments; further testimony, when. The supreme court shall have power to amend any process, pleading or proceeding either in form or substance for the purpose of furthering justice, on such terms as shall be deemed just at any time before final judgment. Also to amend by making proper parties to any case where the court may deem it necessary and proper for the purposes of justice and on such terms as the court may prescribe. And also, whenever it shall appear necessary for the purpose of justice, to allow and direct the taking of further testimony in any case which may be pending in said court under such rules as may be

prescribed, or the court may remand the case to the intent that amendments may be made, further testimony taken or other proceedings had in the court below.

Code, s. 965; R. C., c. 33, s. 17; 1777, c. 115, s. 75; 1785, c. 233; 1792, c. 360; 1831, c. 46.

1494. Petition to rehear may be filed when; execution restrained. A petition to rehear may be filed during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the chief justice, or either of the associate justices, may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined.

Code, s. 966; R. C., c. 33, s. 18; Supm. Ct. Rules, 52, 53, 54.

1495. Exhibits, how proved. Exhibits or other documents relative to cases pending in the supreme court may be proved by the parol testimony of witnesses to be examined in said court in the same manner and under the same rules as such exhibits or documents may be proved in the superior court and suitors in said court may have subpoenas to enforce the attendance of witnesses, who shall be liable to the same penalties and actions for nonattendance, and be entitled to the same pay for traveling, ferriage and attendance as witnesses in the superior court: Provided, that witnesses attending the supreme court shall be taxed in the bill of costs and paid by the party on whose behalf they may be summoned.

Code, s. 968; R. C., c. 33, s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1.

1496. Opinions and judgments to be in writing. The justices shall deliver their opinions and judgments in writing, and the clerk shall make no entry upon the records of the court that any cause pending therein is decided, nor give to any person a certificate of such decision, nor issue execution in such suit, until after the opinion of the court shall have been delivered publicly in open court, and a written copy of the same opinion shall have been delivered to the clerk; which shall afterwards be filed among the records of the court and published in the reports of the decisions made by the court: Provided, that the justices shall not be required to write their opinions in full except in cases in which they deem it necessary.

Code, s. 964; 1893, c. 379, s. 5; R. C., c. 33, s. 16; 1810, c. 794.

1497. Certificates transmitted, when; execution for costs; penalty. The clerk on the first Monday in each month shall transmit by some safe hand, or by mail, to the clerks of the superior courts certificates of the decisions of the supreme court in cases sent from

said court, which shall have been on file ten days; and thereupon the said clerks respectively shall issue execution for the costs incurred in the courts from which the cases were sent; and the clerk of the supreme court shall issue execution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage on letters which concern the transfer of original papers. And if the clerk shall fail for the space of twenty days to perform the duty herein enjoined of transmitting the said certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the supreme court shall have decided, one hundred dollars.

Code, s. 968; 1887, c. 41; R. C., c. 33, s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1, s. 3.

1498. Records recorded. The court may order the clerk to record such parts of the record of cases as it may deem necessary.

Code, s. 959.

III. OFFICERS OF.

1499. May appoint acting attorney general. If the attorney general should fail at any term of the supreme court to attend to the business which by law is assigned him, the court may appoint some counsel learned in the law to discharge his duties during the term.

Code, s. 969; R. C., c. 33, s. 22; 1846, c. 29.

1500. Reporter. The supreme court may employ a reporter of its decisions.

Code, s. 3363; 1893, c. 379, s. 4; 1897, c. 429.

Note. For compensation, see Salaries and Fees.

1501. Clerk. The clerk of the supreme court shall be appointed by the court, and shall hold his office for eight years.

Const., Art. IV, s. 15.

1502. Marshal. The supreme court may appoint an officer to be styled "marshal of the supreme court," removable at will, who shall attend upon the court during its sessions.

Code, s. 950; 1873-4, c. 34; 1881, c. 306.

Note. For compensation, see Salaries and Fees.

NOTE. For power of justices to take probates, see Conveyances.

For clerk's bond and oath of office, see Official Bonds.

For duty of clerk on affirmance in capital felony, see Criminal Proceedings.

CHAPTER 29.

DESCENTS.

(Section 1503.)

1503. Rules of. When any person shall die seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules: Code, s. 1281; R. C., c. 38, s. 1.

RULE 1. *Lineal descent.*

Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided.

Code, s. 1281; R. C., c. 38, Rule 1.

RULE 2. *Females inherit with males, younger with older children; advancements accounted for.*

Females shall inherit equally with males, and younger with older children: Provided, that whenever a parent shall die intestate, having in his or her lifetime settled upon or advanced to any of his or her children, any real or personal estate, such child so advanced in real estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the personal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And in case any one of the children shall have been advanced in real estate of greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent with the excess in value of such real estate so advanced as aforesaid, over and above an equal share as aforesaid. And in case any of the children shall have been advanced in personal estate of greater value than an equal share thereof which shall come to the other children,

he or his legal representatives shall be charged in the division of the real estate, if there be any, with the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate.

Code, s. 1281; R. C., c. 38, s. 1, Rule 2; 1784, c. 204, s. 2; 1808, c. 739; 1844, c. 51, ss. 1, 2.

RULE 3. *Lineal descendant represents ancestor.*

The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living.

Code, s. 1281; R. C., c. 38, Rule 3; 1808, c. 739.

RULE 4. *Collateral descent when estate derived from ancestor.*

On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules.

Code, s. 1281; R. C., c. 38, Rule 4; 1808, c. 739.

RULE 5. *Collateral descent when estate not derived from ancestor.*

On failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting, of the person last seized, whether of the paternal or maternal line, subject to the second and third rules.

Code, s. 1281; R. C., c. 38, Rule 5; 1808, c. 739.

RULE 6. *Half blood inherits with whole; parent from child.*

Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law: Provided, that in all cases where the person last seized shall have left no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father if living, and if not, then in the mother if living.

Code, s. 1281; R. C., c. 38, Rule 6; 1808, c. 739.

RULE 7. *Persons unborn take, when.*

No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the

person last seized, or shall be born within ten lunar months after the death of the person last seized.

Code, s. 1281; R. C., c. 38, Rule 7; 1823, c. 1210.

RULE 8. *When widow takes as heir.*

When any person shall die, leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate.

Code, s. 1281; R. C., c. 38, Rule 8; 1801, c. 575, s. 1.

RULE 9. *Illegitimate children inherit from mother.*

When there shall be no legitimate issue, every illegitimate child of the mother, and the descendant of any such child deceased, shall be considered an heir, and as such shall inherit her estate; but such child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral.

Code, s. 1281; R. C., c. 38, Rule 10; 1799, c. 522.

RULE 10. *Who may take from illegitimate children.*

Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit, if all such children had been born in wedlock: Provided, that when any illegitimate child shall die without issue, his inheritance shall vest in the mother in the same manner as is provided in rule six of this chapter.

Code, s. 1281; R. C., c. 38, Rule 11.

RULE 11. *Estate for life of another, not devised, an estate of inheritance.*

Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner, within the meaning and operation of this chapter.

Code, s. 1281; R. C., c. 38, Rule 12.

RULE 12. *Seizin defined.*

Every person, in whom a seizin is required by any of the provisions of this chapter, shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance.

Code, s. 1281; R. C., c. 38, Rule 13.

RULE 13. *Issue of certain colored persons to inherit.*

The children of colored parents born at any time before the first day of January, one thousand eight hundred and sixty-eight, of persons living together as man and wife, are hereby declared legitimate children of such parents or either one of them, with all the rights of heirs at law and next of kin, with respect to the estate or estates of any such parents, or either one of them. If such children be dead their issue shall represent them with all the rights of heirs at law and next of kin provided by this section for their deceased parents or either of them if they had been living; and the provision of this section shall apply to the estates of such children as are now deceased or otherwise.

Code, s. 1281; 1897, c. 153; 1879, c. 73.

NOTE. For distribution of personal property, see Administration, subchapter Distribution.

CHAPTER 30.**DIVORCE AND ALIMONY.**

(Sections 1504—1518.)

1504. Jurisdiction. The superior court shall have jurisdiction of complaints for divorce and alimony, or either.

Code, s. 1282; 1868-9, c. 93, s. 45.

1505. Bond for costs unnecessary. It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as such other party may recover.

Code, s. 1294; 1871-2, c. 193, s. 41.

1506. Venue. In all proceedings for divorce, the summons shall be returnable to the court of the county in which the applicant resides.

Code, s. 1289; 1871-2, c. 193, s. 40.

1507-8. What marriages may be declared void on application of either party. The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the chapter entitled Marriage,

or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the proviso contained in said chapter.

Code, s. 1283; 1871-2, c. 193, s. 33.

1509. Grounds for absolute divorce. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

1. If either party shall separate from the other and live in adultery.

2. If the wife shall commit adultery.

3. If either party at the time of the marriage was and still is naturally impotent.

4. If the wife at the time of the marriage be pregnant, and the husband be ignorant of the fact of such pregnancy and be not the father of the child with which the wife was pregnant at the time of the marriage.

5. If the husband shall be indicted for a felony and flee the state and does not return within one year from the time the indictment is found.

6. If the wife with whom the husband has never had intercourse shall wilfully and persistently refuse for twelve months to allow the husband to have sexual intercourse with her.

7. If the husband, having married a citizen of North Carolina, shall remove with her to any other state, and while living with her in such other state shall, by cruel or barbarous treatment, endanger her life or render her condition intolerable or burdensome, the wife shall, upon returning to North Carolina, and residing therein separate and apart from the husband for the period of twelve months, be entitled to an absolute divorce; but the husband shall not remarry during the life of the wife. This subsection shall apply only to cases in which the separation took place prior to January thirty-first, eighteen hundred and ninety-nine.

8. If the husband shall wilfully without cause abandon the wife and live separate and apart from her for two years, the wife shall be entitled to divorce from the bonds of matrimony, but the husband shall not remarry within five years from the date of rendering final judgment in the action for divorce, and if the wife shall wilfully and without cause abandon the husband and live separate and apart from him for two years, the husband shall be entitled to divorce from the bonds of matrimony, but the wife in such case shall not remarry within five years from the date of rendering final judgment in the action for divorce: Provided, that in all actions for divorce upon the grounds mentioned in this subsection, it shall be alleged and proven upon the trial that the complainant had been a bona fide resident of

the state of North Carolina for five years next preceding the commencement of the action: And provided further, that after the jury may have found the issue or issues in favor of the plaintiff, it shall be the duty of the judge presiding at the trial to carefully inquire into the facts and circumstances of the particular case, and if he shall be of the opinion that the divorce for any cause should not be granted, he may in the exercise of his discretion, decline to grant the divorce and set aside the verdict: Provided further, that this subsection shall not apply to cases where the abandonment and separation occurs after the first day of January, one thousand nine hundred and three.

Code, s. 1285; 1887, c. 100; 1889, c. 442; 1899, c. 29; 1903, c. 490; 1871-2, c. 193, s. 35; 1879, c. 132.

1510. From bed and board, grounds. The superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

1. If either party shall abandon his or her family; or,
2. Shall maliciously turn the other out of doors; or,
3. Shall by cruel or barbarous treatment endanger the life of the other; or,
4. Shall offer such indignities to the person of the other as to render his or her condition intolerable and life burdensome; or,
5. Shall become an habitual drunkard.

Code, s. 1286; 1871-2, c. 193, s. 36.

1511. Affidavit to be filed with complaint; provisos. The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint; and the plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint; and that complainant has been a resident of the state for two years next preceding the filing of the complaint (or five years where the statute requires a residence of five years); or, if the wife be the plaintiff, that the husband is removing, or about to remove his property and effects from the state, whereby she may be disappointed in her alimony: Provided, if any wife shall file in the office of the superior court clerk of the county where she resides an affidavit, setting forth the fact that she intends to file a petition or bring an action for divorce against her husband, and that she has not had knowledge of the facts upon which said petition or action will be

based for six months, then and in that case it shall be lawful for such wife to reside separate and apart from her said husband, and to secure for her own use the wages of her own labor during the time she shall so remain separate and apart from her said husband: Provided further, that if such wife shall fail to file her petition or bring her action for divorce within thirty days after the six months shall have expired since her knowledge of the facts upon which she intends to file her said petition or bring her said action, then she shall not be entitled any longer to the benefit of this section.

Code, s. 1287; 1868-9, c. 93, s. 46; 1869-70, c. 184.

1512. Material facts found by jury; parties can not testify to adultery. The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact.

Code, s. 1288; 1868-9, c. 93, s. 47.

1513. Alimony on divorce from bed and board. When any court shall adjudge any two married persons divorced from bed and board, it may also decree to the party upon whose application such judgment was rendered, such alimony as the circumstances of the several parties may render necessary; which, however, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered.

Code, s. 1290; 1871-2, c. 193, s. 37.

1514. Alimony pendente lite. If any married woman shall apply to a court for a divorce from the bonds of matrimony, or from bed and board, with her husband, and shall set forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it shall appear to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as shall appear to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of any one interested: Provided, that no order

allowing alimony pendente lite shall be made unless the husband shall have had five days' notice thereof, and in all cases of application for alimony pendente lite under this or the succeeding section, whether in or out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint: Provided further, that if the husband shall have abandoned his wife and left the state, or shall be in parts unknown, or shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice shall be necessary.

Code, s. 1291; 1871-2, c. 193, s. 38; 1883, c. 67.

1515. Alimony without divorce, when. If any husband shall separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, the wife may apply for a special proceeding to the judge of the superior court for the county in which he resides, to have a reasonable subsistence secured to her and to the children of the marriage from the estate of her husband, and it shall be lawful for such judge to cause the husband to secure so much of his estate as may be proper according to his condition and circumstances, for the benefit of his said wife and children, having regard also to the separate estate of the wife.

Code, s. 1292; 1871-2, c. 193, s. 39.

1516. Alimony in real estate, writ of possession issued. In all cases in which the court shall grant alimony by the assignment of real estate, the court shall have power to issue a writ of possession when necessary in the judgment of the court to do so.

Code, s. 1293; 1868-9, c. 123, s. 1.

1517. Effects of absolute divorce. After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture.

Code, s. 1295; 1871-2, c. 193, s. 43.

1518. Custody of children in divorce. After the filing of a complaint in any action for divorce, whether from the bonds of matrimony, or from bed and board, both before and after final judgment therein, it shall be lawful for the judge of the court, in which such application is or was pending, to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the

father or mother as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: Provided, that no order respecting the children shall be made on the application of either party without five days' notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court.

Code, ss. 1296, 1570; 1871-2, c. 193, s. 46.

NOTE. Effect of absolute divorce on right to administer, see ss. 7, 8, 9.
For effect of abandonment on custody of children, see Adoption.
Right of appeal in habeas corpus as to custody of children, see 1833.
For effect on property rights, see ss. 2087-2089.

CHAPTER 31.

DRAINAGE.

| | Sections. |
|------------------------------------|-----------|
| I. Canal established, | 1519—1526 |
| II. Canal drained into; repaired, | 1527—1532 |
| III. Corporation for, | 1533—1540 |
| IV. Corporation formed, canal cut, | 1541—1547 |
| V. Drained, without corporation, | 1548—1552 |
| VI. Servient owner, | 1553—1555 |
| VII. Miscellaneous, | 1556—1559 |

I. CANAL ESTABLISHED.

1519. Petition filed; clerk appoints commissioners. Any person owning pocosin, swamp or flat lands, or owning lowlands subject to inundation, which can not be conveniently drained or embanked so as to drain off or dam out the water from such lands, except by cutting a canal or ditch, or erecting a dam through or upon the lands of other persons, may by petition apply to the superior court of the county, in which the lands sought to be drained or embanked, or some part of such lands lie, setting forth the particular circumstances of the case, the situation of the land to be drained or embanked, to what outlet and through whose lands he desires to drain, or on what lands he would erect his dam, and who are the proprietors of said lands; whereupon a summons shall be served on each of the proprietors, and, on the hearing of the petition,

the court shall appoint three persons as commissioners, who shall be duly sworn to do justice between the parties.

Code, s. 1297; R. C., c. 40, s. 1; 1795, c. 436; 1852, c. 57, ss. 1, 2.

1520. Duty of commissioners. The commissioners, or a majority of them, on a day of which each proprietor of land aforesaid is to be notified at least five days, shall meet on the premises and view the lands to be drained or embanked, and the lands through or on which the drain is to pass or the embankment to be erected, and shall determine and report whether the lands of the petitioner can be conveniently drained or embanked except through or on the lands of the defendants or some of them; and if they are of opinion that the same can not be conveniently done except through or on such lands, they shall decide and determine the route of the canal, ditch or embankment, the width thereof and the depth or height, as the case may be, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, and providing as far as possible for the effectual drainage or embankment of the water from the petitioner's land, and also securing the defendant's lands from inundation, and every other injury to which the same may be probably subjected by such canal, ditch or embankment; and they shall assess, for each of the defendants, such damage as in their judgment will fully indemnify him for the use of his land in the mode proposed; but in assessing such damages, the benefit shall be deducted.

Code, s. 1298; R. C., c. 40, s. 2; 1795, c. 436; 1852, c. 57, ss. 1, 2.

1521. Report; easement in fee; curtilage and mill protected; nuisance forbidden. The commissioners shall report in writing, under their hands, the whole matter to the court, which shall confirm the same, unless good cause be shown to the contrary; and on payment of the damages and costs of the proceedings the court shall order and decree that the petitioner may cut the canal or ditch, or raise the embankment in the manner reported and determined by the commissioners; and thereupon the petitioner shall be seized in fee simple of the easement aforesaid; Provided, that, without the consent of the proprietor, such canal, ditch or embankment shall not be cut or raised through or on his yard or curtilage, nor be allowed when the same shall injure any mill, by cutting off or stopping the water flowing thereto; nor shall said dam be allowed so as to create a nuisance by stagnant water, or cut off the flow of useful springs or necessary streams of water, or stop any ditches of such proprietor when there is no freshet.

Code, s. 1299; R. C., c. 40, s. 3; 1795, c. 436, s. 2; 1835, c. 7; 1852, c. 57, ss. 1, 2.

1522. Width of right of way. The commissioners, when they may deem it necessary, shall designate the width of the land to be

left on each side of the canal, ditch or dam, to be used for the protection and reparation thereof, which land shall be altogether under the control and dominion of the owner of the canal, ditch or dam, except as aforesaid: Provided, that in no case shall a greater width of land on both sides, inclusive of a dam, be taken than five times the base of such dam.

Code, s. 1302; R. C., c. 40, s. 6.

1523. When owner can fence or cross canal. Any proprietor, through or on whose land such canal or ditch may be cut or embankment raised, may put a fence or make paths across the same, provided the usefulness thereof be not impaired; and the owner of the canal, ditch or dam, his heirs and assigns, shall at all times have free access to the same, for the purpose of making and repairing them; doing thereby no unnecessary damage to the lands of the proprietors.

Code, s. 1300; R. C., c. 40, s. 4; 1795, c. 436, s. 2; 1835, c. 7; 1852, c. 57, ss. 1, 2.

1524. Earth for dam; owner may adjoin his dam, when. The earth necessary for the erection of a dam may be taken from either side of it, or wherever else the commissioners may designate and allow. And such dam may be removed by the proprietor of the land, his heirs or assigns, to any other part of his lands, and he may adjoin any dam of his own thereto, if allowed by the court on a petition, and such proceedings therein as are provided in this chapter, as far as the same may apply to his case: Provided, always, that the usefulness of the dam will not be thereby impaired or endangered.

Code, s. 1301; R. C., c. 40, s. 5.

1525. Earth from canal removed or leveled. The earth excavated from the canal or ditch shall be removed away or leveled as nearly as may be with the surface of the adjacent land, unless the commissioners shall otherwise specially allow.

Code, s. 1303; R. C., c. 40, s. 7.

1526. Drain not to be opened within thirty feet of canal. The proprietor of any swamp or flat lands, through which a canal or ditch passes, shall not have a right to open or cut any drain within thirty feet thereof, but by the consent of the owner. Such proprietor, however, and other persons may cut into such canal or ditch in the manner hereinafter provided.

Code, s. 1304; R. C., c. 40, s. 8.

II. CANAL DRAINED INTO; REPAIRED.

1527. Right to drain into canal, how obtained. Any person desirous of draining into the canal or ditch of another person as an outlet, may do so in the manner hereinbefore provided, and in addition to the persons directed to be made parties, all others shall be parties through whose lands, canals or ditches the water to be drained may pass till it shall have reached the furthest artificial outlet. And the privilege of cutting into such canal or ditch may be granted under the same rules and upon the same conditions and restrictions as are provided in respect to cutting the first canal or ditch: Provided, that no canal or ditch shall be allowed to be cut into another, if thereby the safety or utility of the latter shall be impaired or endangered: Provided further, that if such impairing and danger can be avoided by imposing on the petitioner duties or labor in the enlarging or deepening such canal or ditch, or otherwise, the same may be done; but no absolute decree for cutting such second canal or ditch shall pass till the said duties or work so imposed shall be performed and the effect thereof is seen, so as to enable the commissioners to determine the matter whether such second canal or ditch ought to be allowed or not: Provided, that any party to the proceeding may appeal from the judgment of the court rendered under this section to the superior court of the county at term time, where a trial and determination of all issues raised in the pleadings shall be had as in other cases before a judge and jury.

Code, s. 1305; 1887, c. 222; R. C., c. 40, s. 9.

1528. Labor for repair apportioned; on confirmation to be a judgment. Besides the damages which the commissioners may assess against the petitioner for the privilege of cutting into such canal or ditch, they shall assess and apportion the labor which the petitioner and defendants shall severally contribute towards repairing the canal or ditch into or through which the petitioner drains the water from his lands, and report the same to court; which, when confirmed, shall stand as a judgment of the court against each of the parties, his executors and administrators, heirs and assigns.

Code, s. 1306; R. C., c. 40, s. 10.

1529. How joint canals repaired. Whenever the canals or ditches for the reparation of which more than one person shall be bound under the provisions of the preceding section, shall need to be repaired, any of the persons so bound may notify the others thereof, and of the time he proposes to repair the same; and thereupon each of the persons shall jointly work on the same and contribute his proportion of labor till the same be repaired or the work cease by consent.

Code, s. 1307; R. C., c. 40, s. 11.

1530. Judgment on failing to repair; a lien on land. In case the person so notified shall make default, any of the others may perform his share of labor and recover against him the value thereof, on a notice to be issued for such default, in which shall be stated on oath made before the clerk the value of such labor, and unless good cause to the contrary be shown on the return of the notice, the court shall render judgment for the same with interest and costs; which judgment shall be a lien upon the said lands from the date of the performance of the work.

Code, s. 1308; 1899, c. 396; R. C., c. 40, s. 12.

1531. Assignee bound as original owner to repair. All persons to whom may descend, or who may otherwise own or occupy lands drained by any canal or ditch, for the privilege of cutting which any labor for repairing is assessed, shall contribute the same, and shall be bound therefor to all intents and purposes, and in the same manner and by the same judgment as the original party himself would be if he occupied the land.

Code, s. 1309; R. C., c. 40, s. 13.

1532. How amount of contribution for repair ascertained. Whenever there shall be a dam, canal, or ditch, in the repairing and keeping up of which two or more persons shall be interested and receive actual benefit therefrom, and the duties and proportion of labor which each one ought to do and perform therefor shall not be fixed by agreement or by the mode already in this chapter provided for assessing and apportioning such labor, any of the parties may have the same assessed and apportioned by applying to a justice of the peace, who shall give all parties at least three days' notice, and shall summon two disinterested freeholders who, together with the justice, shall meet on the premises, and assess the damages sustained by the applicant, whereupon the justice shall enter judgment in favor of the applicant for damages or for work done on such ditch or lands. The costs of this proceeding shall be in the discretion of the justice.

Code, s. 1310; 1889, c. 101; R. C., c. 40, s. 14.

III. CORPORATION FOR.

1533. Procedure to drain swamp lands; corporation created. Any proprietor in fee of swamp lands, which can not be drained except by cutting a canal through the lands of another, or other proprietor in fee, situated at a lower level and which would also be materially benefited by the cutting of such canal, who desires that said canal be cut on the terms on which it is hereinafter allowed, may apply by petition, setting forth the facts to the superior court

of the county in which any of the lands through which the canal will pass may lie.

Code, s. 1311; 1868-9, c. 164, s. 2.

1534. Commissioners appointed to examine and report. On the establishment by the petitioner of his allegations, the court shall appoint three persons as commissioners who, having been duly sworn, shall examine the premises and inquire and report—

1. Whether the lands of the petitioner can be conveniently drained, otherwise than through those of some other person.

2. Through the lands of what other persons a canal to drain the lands of the petitioner should properly pass, considering the interests of all concerned.

3. A description of the several pieces of lands through which the canal would pass; and the present values of such portions of said pieces of lands as would be benefited by it; and the reasons for arriving at the conclusion as to the benefit.

4. The route and plan of the canal, including its breadth, depth and slope, as nearly as they can be calculated, with all other particulars necessary for calculating its cost.

5. The probable cost of the canal and of a road on its bank, and of such other work, if any, as may be necessary for its profitable use.

6. The proportion of the benefit (after a deduction of all damages) which each proprietor would receive by the proposed canal and a road on its bank if deemed necessary, and in which each ought, in equity and justice, to pay toward their construction and permanent support.

7. With their report they shall return a map explaining, as accurately as may be, the various matters required to be stated in their report.

Code, s. 1312; 1868-9, c. 164, s. 3.

1535. May employ a surveyor. The said commissioners may employ a surveyor to prepare the map required to accompany their report.

Code, s. 1313; 1868-9, c. 164, s. 4.

1536. When report confirmed. If it appear that the lands on the lower level will be increased in value twenty-five per cent. or upwards by the proposed improvement, within one year after the completion thereof, and that the cost of making such improvement will not exceed three-fourths of the present estimated value of the land to be benefited, and that the proprietors of at least one-half in value of the land to be affected consent to the improvement, the court may confirm such report, either in full, or with such modifications therein as shall be just and equitable.

Code, s. 1314; 1868-9, c. 164, s. 5.

1537. Effect of confirmation; proprietors a corporation. Upon a final adjudication, confirming the report, the proprietors of the several pieces of land adjudged to be benefited by the improvement, shall be declared a corporation, of which the capital stock shall be double the estimated cost of the improvements, and in which the several owners of the land adjudged to be benefited, shall be corporators, holding shares of stock in the proportions in which they are adjudged liable for the expense of making and keeping up the improvement.

Code, s. 1315; 1868-9, c. 164, s. 6.

1538. Corporate name; officers; by-laws; powers. The person assessed to pay the highest sum shall be president of the company until another shall be elected; he shall, or in case of his refusal or an unreasonable delay, any other stockholder, may call a meeting of the corporators. The corporators shall choose a corporate name, elect a president and such other officers as may be necessary, and make all by-laws and regulations, not contrary to law, which may be necessary or proper for effecting the purposes of the corporation; they shall fix the number of shares of stock, and assign to each proprietor his proper number; they shall assess the sums which shall be payable by each proprietor, and to ascertain the time and mode of payment, in every meeting each proprietor shall vote once for each share owned by him.

Code, s. 1316; 1868-9, c. 164, s. 7.

1539. Shares annexed to land. The ownership of the shares of stock is indissolubly annexed to the ownership of the pieces of land adjudged to be benefited by the improvement; and such shares, or a part thereof proportionate to the area of such land that may descend or be conveyed for any longer time than three years, shall, upon such descent or conveyance, descend and pass with the land, even although such shares be not mentioned in the deed of conveyance, and although their transfer be forbidden by such deed so that every owner of said land in possession, except tenant for a term of years, not exceeding three, and every owner in reversion or remainder after a term not exceeding three years, shall, during his ownership, be entitled to all the rights and privileges and be subject to all the obligations and burdens of a corporator. Every attempted sale of shares otherwise than as annexed to the land shall be void.

Code, s. 1317; 1868-9, c. 164, s. 8.

1540. Shareholder to obey by-laws and pay assessments. Every corporator shall be bound to obey the lawful by-laws of the company, and pay all dues lawfully assessed on him: Provided, he

shall in no case pay more than his proportion of the expenses as fixed by this chapter; and such dues may be collected in the corporate name in any court having jurisdiction; and every assessment duly docketed in the county where the land to be affected lies, shall be a lien on the lands of the debtor which are connected with the corporation from the date of such docketing.

Code, s. 1318; 1868-9, c. 164, s. 9.

IV. CORPORATION FORMED; CANAL CUT.

1541. Payment of dues entitles shareholder to use of canal.

Every corporator, paying his dues legally assessed without regard to the number of his shares, shall be entitled to the full and free use of said canal for drainage and navigation, and of the road for passage and transportation. By-laws may be made to regulate these rights, but not so as to produce an inequality.

Code, s. 1319; 1868-9, c. 164, s. 10.

1542. Privilege of infants. If any proprietor whose lands are adjudged to be benefited by a canal shall be an infant, no process shall be issued against him during his minority, or within twelve months thereafter, to enforce payment of any assessment, and he may, at any time within such twelve months, apply to have any order, judgment or decree made against him set aside as to him. If the infant or his guardian shall, during his minority, and the twelve months next thereafter, pay the dues assessed on him, he shall have all the rights and privileges of a corporator, to be exercised through his guardian. If the infant shall fail to pay, he shall not have any such rights, but if no action to set aside the judgment of the court creating the corporation shall have been brought by him as aforesaid, or upon the decision of such action against him, he shall be entitled to receive his proper share of stock and to possess all the rights and be bound by all the liabilities of a corporator, including a liability for assessments made during his minority, but not for interest on such, nor for any penalty for their prior non-payment.

Code, s. 1320; 1868-9, c. 164, s. 11.

1543. Compensation for damage to lands. If any proprietor of lands shall be damaged by any improvement proposed the commissioners shall so report, and he shall be entitled to be compensated as may be just by the proprietor whose lands are benefited in proportion to the benefit to them respectively; but in estimating such damage the benefit shall be deducted, and such proprietor shall be entitled to all the rights and privileges of a corporation as respects the

use of the improvement, but shall not be entitled to a vote, or be bound for the assessment.

Code, s. 1321; 1868-9, c. 164, s. 12.

1544. Court may dissolve corporation. If, from any cause, the canal or other improvement shall become, or shall prove to be valueless, any corporator may apply as is provided in other cases of special proceedings, and the court may dissolve the corporation created in connection with it.

Code, s. 1322; 1868-9, c. 164, s. 13.

1545. Method of incorporating a joint canal already constructed. Whenever the proprietors of any canal already cut shall desire to become incorporated, any number of said proprietors, not less than one-third in number, may file their petition before the clerk of the superior court of the county in which said canal is located, or in either county, where the said canal may be located in more than one county, setting forth the names of said proprietors, the length and size of said canal, the name of the owners of land draining in said canal, and the quantity of land tributary thereto. And upon filing said petition, summons shall issue to all parties having an easement in said canal, returnable as in other special proceedings; upon the return thereof, or upon a day fixed by the clerk for hearing same, all owners of said canal may become corporators therein, and upon failure of any to avail themselves of that right, they shall not be entitled to become corporators, except under such by-laws and regulations as such corporation shall make and declare. But those who fail to avail themselves of the benefit of this subchapter shall not be deprived of their easement in said canal, but shall enjoy the same upon payment to said corporation of the assessment made upon them pro rata with the said corporators; such assessment shall be made on the land tributary to said canal and apportioned pro rata to each owner thereof; it shall be made by the said corporation on ten days' notice to each owner of said land, under such rules and regulations as the by-laws may prescribe; but any person dissatisfied therewith shall have the right to appeal to a jury at the regular term of the superior court of said county, and the amount of damages assessed shall be a first lien on the land of the owner against whom judgment shall be rendered: Provided, that in making such assessment upon land owners who are not members of the said corporation it shall be unlawful to charge in said assessment any charges or per diem pay for the officers of said canal company against the owner of said land, and any such attempt to charge the salaries or per diem of officers of said canal company in said assessment shall render the same void.

1889, c. 380; 1901, c. 670.

1546. Laborer's lien for work on canal. Whenever work or repairs shall be done on such canal and any of the parties owning lands liable to be assessed for such work or repairs shall fail or refuse to pay the amount assessed upon their lands, then and in that event the laborer or laborers performing such work shall have a lien upon such land to the extent of the amount assessed against the same by the corporation, and such lien may be enforced in the same manner as provided by the laws of this state for the enforcement of laborers' liens.

1899, c. 600, s. 2.

1547. Penalty for nonpayment of assessment. Whenever any person whose lands have been adjudged liable to contribute to the maintenance or repair of said canal shall fail or refuse to pay the amount assessed against his land for such maintenance or repair for thirty days after such payment has been demanded by the company, then and in that event the company may give such person notice in writing of its intention to cut off his right of drainage into said canal, and if such person shall still neglect and refuse to pay said assessment for thirty days after such notice, then the company may proceed to so obstruct and dam up the ditches of such delinquent as will effectually prevent his drainage into said canal.

1899, c. 600, s. 3.

V. DRAINED WITHOUT CORPORATION.

1548. Procedure to drain lowlands in Hyde. Upon the petition of three citizens in any county to the county commissioners, petitioning for the draining of any creek, swamp or branch either upon the plea of health or to promote and advance the agricultural interests of the farmers who may own lands lying on said creek, swamp or branch petitioned to be drained, the county commissioners shall within ten days after the filing of such petition order the county surveyor to summon three disinterested freeholders, good and lawful men of intelligence and discretion, who shall constitute a board, and the county surveyor shall be the chairman of said board; and the chairman shall give all persons who may be interested in having said creek, swamp or branch drained three days' notice of the time and place of the meeting of the board: Provided, the petitioners shall deposit with the county treasurer the sum of twenty-five dollars for the payment of current expenses not otherwise provided for in this subchapter: Provided further, this and the six succeeding sections shall apply to lakes in Hyde county.

1887, c. 267; 1901, c. 166.

1549. Board to meet, make report; what report to show. The board provided for in the preceding section shall meet at the call

of the chairman and shall proceed to inspect and examine the lands as described in the petition to be drained, and the board shall have power to summon witnesses, administer oaths and take testimony, and if the board decides that the lands specified in the petition shall be drained, either on the plea of health or for the benefit of the farms lying on or contiguous to said water-course, then the board shall select a place at which the ditch shall be begun. They shall also decide the depth and width of the ditch to be dug, and shall proceed to survey, locate, lay off and mark the course of the ditch, and the board shall assign to the land owners the amount of labor to be performed and the amount of money to be paid for the purpose of defraying the necessary expenses by each land owner in proportion to the amount of lands drained or pro rata benefits received by the drainage of such lands, and the said board shall specify the time in which the work so assigned shall be completed: Provided, no one shall be required to commence on the work assigned to him until the person next below him shall have completed his work in accordance with the specification of the board.

1887, c. 267, s. 2.

1550. Report to be in writing; what to contain; costs. The board shall make a written report to the county commissioners showing all the acts and decisions of the board as to the length, depth and width of the ditch, the names of all the owners of the lands that will be drained and the amount of work to be performed and the amount of money to be paid by each person benefited by such drainage. But in case the board determines that the lands described in the petition shall not be drained, then the expenses of the board shall be paid out of the funds deposited with the county treasurer by the petitioners.

1887, c. 267, s. 3.

1551. Persons whose lands are drained shall keep canal on his land clear. All persons whose lands shall be drained under the provisions of this subchapter shall keep the ditch on his land clear of all rafts of logs, brush or any trash that will obstruct the flow of water through the ditch.

1887, c. 207, s. 4.

1552. Compensation of board and county surveyor. The compensation of the board shall be as follows: The county surveyor shall receive three dollars per day and the other members shall receive one dollar and fifty cents per day while engaged in the duties imposed in this chapter.

1887, c. 267, s. 5.

VI. SERVIENT OWNER.

1553. Procedure to drain lowlands. Any person owning lands lying upon any creek, swamp or other stream not navigable, which are subject to inundation and which can not be conveniently drained or embanked on account of the volume of water flowing over the same from lands lying above, and by draining the same the lands above will be benefited and better drained, such person may by petition apply to the superior court of the county in which the lands sought to be drained or embanked, or some part of such lands, lie, setting forth the particular circumstances of the case, the valuation of the lands to be drained or embanked, and what other lands above would be benefited, and who are the proprietors of such lands; whereupon a summons shall be served upon each of the proprietors, who are not petitioners, requiring them to appear before said court at a time to be named in said summons, which shall not be less than ten days from the service thereof, and upon said day the petition shall be heard and the court shall appoint three persons as commissioners, who shall, before entering upon the discharge of their duties, be sworn to do justice between said parties: Provided that any proceedings under this section in the county of Lenoir shall be had before a justice of the peace.

1889, c. 253; 1891, c. 73.

1554. Commissioners to examine lands and make report. The commissioners, or a majority of them, on a day of which each proprietor is to be notified at least five days, shall meet on the premises and view the land to be drained, and the lands affected thereby, and shall determine and report whether the lands of the petitioner or petitioners ought to be drained exclusively by him or them, and if they are of the opinion that the same ought not to be drained exclusively at the expense of the petitioner or petitioners, they shall decide and determine the route of the canal, ditch or embankment, the width thereof and the depth and height, as the case may be, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, and providing as far as possible for the effectual drainage of the petitioner's land, and the protection and benefit of the defendant's land; and they shall apportion the labor to be done or assess the amount to be paid by each of the owners of the lands affected by said canal, ditch or embankment, towards the construction and keeping the same in repair, and report the same to the court, which, when confirmed, shall stand as a judgment of the court against each of the parties, his executors, administrators, heirs and assigns: Provided, that in Lenoir county all proceedings under this section shall be had before a justice of the peace and: Provided further, that in said county if said judgment is

not paid at the time of its rendition it shall be by the justice sent by transcript to the clerk of the superior court to be docketed as a judgment against the party or parties so failing to pay, and said judgment shall be a lien on the land of said defaulting party or parties for the payment of all assessments and costs.

1889, c. 253, s. 2; 1891, c. 73, s. 2.

1555. Cost of repairs to be enforced by judgment. Whenever any such ditch, canal or embankment shall need repairs or cleaning out, and any of the parties interested therein refuse to perform the labor apportioned to them, or refuse to contribute the amount assessed against them, the same shall be enforced in the manner provided for in section fifteen hundred and thirty for the joint repair of canals and ditches.

1889, c. 253, s. 3.

VII. MISCELLANEOUS.

1556. Servient owner refusing to repair, dominant owner may. In the absence of any agreement for maintaining the efficiency of such ditch or canal, or should the servient owners neglect or refuse to clean out or aid in cleaning out the same through their lands it shall be lawful for the dominant or higher owners, after giving three days' notice to servient owners, to enter along such canal and not more than twelve feet therefrom, and clean out or remove obstructions or accumulated debris therefrom at their own personal expense or without cost to the servient owner.

1899, c. 255, s. 2.

1557. Canal dug seven years evidence of its necessity; owner may apply to clerk to have labor of repairing apportioned; method of procedure. After a canal has been dug along any natural depression or waterway and maintained for seven years, it shall be prima facie evidence of its necessity, and upon application to the clerk of the superior court of any land owner who contributed to digging and is interested in maintaining the same, it shall be the duty of the clerk of the superior court to appoint and cause to be summoned three disinterested and discreet freeholders, who, after being duly sworn, shall go upon the lands drained or intended to be drained by said canal, and after carefully examining the same and hearing such testimony as may be introduced touching the question of cost of canal, the amount paid and the advantages and disadvantages to be shared by each of the parties to the action, shall make their report in writing to the clerk of the superior court stating the facts and apportioning the cost of maintaining said canal among the parties to the action, and the cost of the action shall be divided in the same ratio; and their report when approved shall be properly registered

by the clerk. The collection of cost and proportion of work on the canal shall be as prescribed in this chapter.

1899, c. 255, s. 3.

1558. Easement of drainage may be surrendered; liability for assessments to cease. If any person or persons, or those claiming through or under them, who have cut any ditch or canal into which any other person has been permitted to drain land under any proceeding authorized in this chapter shall desire to surrender his or their easement or right in the said ditch or canal and be discharged from any judgment rendered and existing under such proceedings, such person or persons may on motion have such proceeding reinstated for hearing and file a petition therein setting forth such fact or any other grounds for relief thereunder, and upon proof satisfactory to the court that such petitioner or petitioners have cut another ditch or canal which drains his or their lands formerly drained by the first ditch or canal and have abandoned the use of it for any purpose of drainage, the court shall adjudge the said easement or right of the petitioner or petitioners surrendered and determined, and from that time the said petitioner or petitioners and their land shall forever be discharged and released from the judgment heretofore rendered in such former proceeding: Provided, however, that all parties then having an easement or right in such ditch or canal shall be served with notice of such petition twenty days before the hearing thereof.

1887, c. 222, s. 3.

1559. Proceeding, a special proceeding. The proceeding under this chapter shall be the same as prescribed in cases of condemnation of land for railroads.

Code, s. 1324.

CHAPTER 32.

ELECTRIC COMPANIES.

(Sections 1560—1566.)

1560. May use public highways. Any duly incorporated company possessing the power to construct telegraph or telephone lines, lines for the conveying of electric power or for lights, either or all, shall have the right to construct, maintain and operate such lines along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway.

Code, s. 2007; 1899, c. 64, s. 1; 1903, c. 562; 1874-5, c. 203, s. 2.

1561. May acquire easement in right of way. Such telegraph telephone, or electric power or lighting company shall have power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right of way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation: Provided, that this section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation.

Code, s. 2008; 1899, c. 64; 1903, c. 562, ss. 1, 2; 1874-5, c. 203, s. 3.

1562. May exercise right of eminent domain. Such telegraph, telephone, electric power or lighting company shall be entitled to the right of way over the lands, privileges and easements of other persons and corporations, and the right to erect poles and to establish offices, upon making just compensation therefor.

Code, s. 2009; 1899, c. 64; 1903, c. 562; 1874-5, c. 203, s. 4.

1563. Proceedings to condemn land. Whenever such telegraph, telephone, electric power or lighting company shall fail on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it shall be lawful for such company, first giving security for costs, to file its petition before the superior court for the county in which said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant: Provided, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right of way of a railroad or railway company extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such right of way extends: Provided further, that it shall not be necessary for the petitioner to make any survey of or over the right of way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its board of directors.

Code, s. 2010; 1899, c. 64, s. 2; 1903, c. 562; 1874-5, c. 203, s. 5.

1564. Copy of petition to be served. A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court.

Code, s. 2011; 1874-5, c. 203, s. 6; 1899, c. 64, s. 3.

1565. Proceedings same as for railroads. The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed for condemning lands to the use of railroads.

Code, s. 2012; 1899, c. 64; 1903, c. 562.

1566. Commissioners to inspect premises. In considering the question of damages when the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on such testimony as to them may be satisfactory.

Code, s. 2013; 1874-5, c. 203, s. 9.

NOTE. For certain powers of electric companies, see Corporations.

CHAPTER 33.

ESTATES.

(Sections 1567—1579.)

1567. Estates in tail converted into fee simple. Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple; and all sales and conveyances, made bona fide and for valuable consideration, since the first day of January, in the year of our Lord one thousand seven hundred and seventy-seven, by any tenant in tail in actual possession of any real estate where such estate hath been conveyed in fee simple, shall be good and effectual in law to bar any tenant in tail and in remainder, of

and from all claim, action and right of entry, whatsoever, of, in, and to such entailed estate, against any purchaser, his heirs, or assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee simple.

Code, s. 1325; R. C., c. 43, s. 1; 1784, c. 204, s. 5.

1568. Joint tenancy; survivorship abolished, when. In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, or assigns respectively of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, shall be vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the said joint business; but as soon as the same shall be effected, the survivor shall account with, and pay, and deliver to the heirs, executors, administrators and assigns respectively of such deceased partner, all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners.

Code, s. 1326; R. C., c. 43, s. 2; 1784, c. 204, s. 6.

1569. Survivorship among trustees. In all cases where only a naked trust has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estates under the same shall be exercised by any one of such trustees, in the event of the death of his cotrustee or cotrustees or the refusal or inability of the cotrustee or cotrustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year one thousand seven hundred and eighty-four.

1885, c. 327, s. 1.

Note. Executors and administrators hold as joint tenants, see s. 164.

For revocation of contingent estates, see s. 991.

1570. How certain contingent limitations construed. Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such heir,

or issue, or child, or offspring, or descendant or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight.

Code, s. 1327; R. C., c. 43, s. 3; 1827, c. 7.

1571. Unborn infant in esse may take by deed. An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born.

Code, s. 1328; R. C., c. 43, s. 4.

1572. Heirs of living person construed to mean children. Any limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will.

Code, s. 1329; R. C., c. 43, s. 5.

1573. Conveyance to use, possession transferred to use without livery of seizin. By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, or otherwise, by any manner or means whatsoever it be, the possession of the bargainor, releasor, or covenantor shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed at common law with livery of seizin of the land intended to be conveyed by such deed or covenant.

Code, s. 1330; R. C., c. 43, s. 6; 27 Hen. VIII., c. 10.

1574. Rights of grantee of reversion against life tenant. Whenever a conveyance shall be made by any person of any reversion in lands, rents, tenements, or hereditaments, which at the time of such conveyance shall be held by any other person for a term of life or years, such grantee, his heirs, executors, administrators, and assigns shall have the like advantages against the tenant for life, and against the tenant for years, his executors, administrators, and assigns, by entry for nonpayment of rent and for doing of waste, and the same benefit and advantage and remedies by action for the not performing of other conditions, covenants, or agreements, contained and expressed in the indentures or other agreement, by

which such tenant for life or years holds the same lands, tenements, rents or hereditaments against said tenant for life or for years, his executors, administrators and assigns, as the grantor or lessor himself or his heirs might have.

Code, s. 1331; R. C., c. 43, s. 7; 32 Hen. VIII., c. 34; 1868-9, c. 156, s. 18.

1575. Right of life tenant against grantee of reversion. Lessees and grantees of lands, rents, tenements and hereditaments for term of years or life, their executors, administrators and assigns, shall have like action, advantage and remedy against every person, his heirs and assigns, who shall have any conveyance from any person of the reversion of the same lands, rents, tenements and hereditaments, so let or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indenture of their leases, as the same lessees, or any of them, might and should have had against the said lessor and grantor, and his heirs.

Code, s. 1332; R. C., c. 43, s. 8; 32 Hen. VIII., c. 34, s. 2.

1576. Collateral warranties abolished; warranties by life tenant good only as to heir. All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenantor in like manner as other obligations.

Code, s. 1334; R. C., c. 43, s. 10; 4 Anne, c. 16, s. 21; 1852, c. 16.

1577. Spendthrift trusts authorized. It shall be lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars, to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relations, whether the same be contracted or incurred before or after the grant.

Code, s. 1335; 1871-2, c. 204, s. 1.

1578. Titles quieted. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claims. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff can not recover costs. In any case in which judgment has been or shall be docketed, whether such

judgment shall be in favor of or against the person bringing such action, or shall be claimed by him, or shall affect real estate claimed by him, or whether such judgment shall be in favor of or against the person against whom such action may be brought, or shall be claimed by him, or shall affect real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is contemplated by this section.

1893, c. 6; 1903, c. 763.

1579. Contingent remainders may be sold; procedure; proviso.

In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the superior court at term time, which proceeding shall be conducted in the manner pointed out in this section: Such proceedings may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land, shall be made parties defendant and served with summons as in other civil actions, and upon nonresidents or persons whose names and residences are unknown, by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency can not be ascertained, the judge of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem to represent such remaindermen, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the judge, who shall by an order give instructions as to the employment of counsel and the payment of fees. The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold.

1903, c. 99.

CHAPTER 34.

EVIDENCE.

| | Sections. |
|---------------------------------------|-----------|
| I. Statutes, | 1580—1583 |
| II. Grants, deeds and wills, | 1584—1601 |
| III. Official writings, | 1602—1603 |
| IV. Records, etc., other states, | 1604—1605 |
| V. Counsel and physicians, | 1606—1607 |
| VI. Accounts, | 1608—1611 |
| VII. Mortuary tables, | 1612 |
| VIII. Competency of witnesses, | 1613—1622 |
| IX. Attendance of witness, | 1623—1628 |
| X. Depositions, | 1629—1639 |
| XI. Writings, production, inspection, | 1640—1642 |
| XII. Confederate currency, | 1643 |

I. STATUTES.

1580. How proved. All statutes, or joint resolutions, passed by the general assembly, may be read in evidence from the printed statute book.

Code, s. 1339; R. C., c. 44, s. 4; 1826, c. 7.

1581. Martin's collection; copies certified by secretary of state. Any private act published by Francis X. Martin, in his collection of private acts, or a copy of any act of the general assembly certified by the secretary of state, shall be received in evidence in every court.

Code, s. 1340; R. C., c. 44, s. 5; 1826, c. 7, s. 2.

1582. Laws of other states or foreign countries, how proved. A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten, or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof. And either party may also exhibit a copy of the law of such state, territory, or foreign country, duly certified by the secretary of state of this state as having been copied from a

printed volume of the laws of such state, territory or country, on file in the state, or supreme court, library, or in the offices of the governor or secretary of state.

Code, s. 1338; R. C., c. 44, s. 3; 1823, c. 1193, ss. 1, 3; C. C. P., s. 360.

Note. See also s. 2502.

1583. Town ordinances. In the trial of appeals from mayors' courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance.

1899, c. 277, s. 2.

II. GRANTS, DEEDS AND WILLS.

1584. Copies certified by secretary of state. Copies of the plots and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the secretary of state, certified by him as true copies, shall be as good evidence, in any court, as the original.

Code, s. 1341; R. C., c. 44, s. 6; 1822, c. 1154.

1585. Copies of grants certified by clerk of secretary of state validated. All copies of grants heretofore issued from the office of the secretary of state, duly certified under the great seal of the state, and to which the name of the secretary has been written or affixed by the clerk of the said secretary of state, are hereby ratified and approved and declared to be good and valid copies of the original grants and admissible in evidence in all courts of this state when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the secretary of state in person and duly registered.

1901, c. 613.

1586. Copies certified by register of deeds, evidence, when. A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavits suggesting some material variance from the original in such registry

or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court.

Code, s. 1251; 1893, c. 119, s. 2; R. C., c. 37, s. 16; 1846, c. 68, s. 1.

1587. Copy certified may be registered in another county and given in evidence. A copy from the office of the register of deeds of any county of the record of any deed, mortgage, power of attorney or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of such county, may, upon presentation to the register of deeds of any other county, be registered without further proof, and the record thereof, or a duly certified copy of the same, may be given in evidence in any court in the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court.

Code, s. 1253; 1893, c. 119, s. 3; R. C., c. 37, s. 16; 1846, c. 68.

Note. See Conveyances.

1588. Evidence to support title under H. E. McCulloch. In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made.

Code, s. 1336; R. C., c. 44, s. 1; 1819, c. 1021.

1589. Grant or copy from proprietor, sufficient evidence of title under him. In all trials where the titles of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts number one and three, it shall not be required of such party to produce, in support of his title, either

the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence.

Code, s. 1337; R. C., c. 44, s. 2; 1807, c. 724.

1590. Deeds registered and lost, registry lost, presumed in due form. Whenever it shall be shown in any judicial proceeding, that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that a copy thereof can not be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee simple, if the grantor was entitled to such an estate at the time of conveyance; and that it was made upon sufficient consideration.

Code, s. 1348; R. C., c. 44, s. 14; 1854, c. 17.

1591. Copy of will. Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence.

Code, s. 2175; R. C., c. 119, s. 21; 1784, c. 225, s. 6.

1592. Evidence to fit the land to the description. In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such land as it purports to pass: Provided, that such paper-writing is in all other respects sufficient to pass such title or interest.

1891, c. 465, s. 1.

1593. Recitals in tax deeds in Haywood and Henderson. In all legal controversies, touching lands in the counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and

unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited.

Code, s. 1346; R. C., c. 44, s. 11.

1594. Copies of wills in secretary of state's office; proviso.

Copies of wills filed or recorded in the office of the secretary of state, attested by the secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon.

Code, s. 2181; R. C., c. 44, s. 12; 1852, c. 172; 1856-7, c. 22.

1595. Copies of wills recorded in wrong counties.

Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the state, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this state.

Code, s. 2182; 1858-9, c. 18.

1596. Proved will lost, not recorded, copy evidence.

When any will which may have been proved and ordered to be recorded shall have been destroyed during the late war, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied with the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in the chapter entitled *Burnt and Lost Records*.

Code, s. 2183; 1866-7, c. 127.

1597. Copies of grants in Burke.

Copies of grants issued by the state within the county of Burke prior to the destruction of the records of said county by General Stoneman in one thousand eight hundred and sixty-five, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or can not be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant.

1901, c. 513.

1598. Copies of lost records in Bladen.

Whereas, the most of the records in the office of the clerk of the superior court of Bladen

county were damaged by fire, and are in such a mutilated condition that it is impossible to use them, and several of them being of almost daily use, especially the judgment document and will books: The clerk of the superior court of Bladen county shall transcribe the judgment docket and index books and the will books in his office, and all other books in said office containing records made since one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the original records would have, and shall be received in evidence as the original records and be prima facie evidence of their correctness, and of the sufficiency of their probate, though the probates are lost and are not transcribed.

1895, c. 415; 1903, c. 65.

1599. Copies of records from Tyrrell. Copies of records of the county of Tyrrell between one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the superior court of Tyrrell county as to the records of his office and the register of deeds as to the records of his office, and deposited in their respective offices in Washington county, shall be treated in all respects as original records and received as evidence in all courts.

1903, c. 199.

1600. Copies of grants in Moore. Copies of grants for land situated in Moore county and the counties of which Moore was a part, entered in a book, and the book being certified under the seal of the secretary of state, shall have the force and effect of the originals and be evidence in all courts.

1903, c. 214.

1601. Wills in Haywood. All wills recorded by the clerk of the superior court of Haywood county, under and by virtue of chapter eight of the laws of one thousand eight hundred and eighty-five, shall be deemed and held to have been duly probated and recorded, subject for any person interested to show by competent proof that said will has never been proved and recorded.

1885, c. 8.

III. OFFICIAL WRITINGS.

1602. Copies of official writings. Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the governor, treasurer, auditor, secretary of state, attorney general or adjutant general, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his

office, when there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under his hand and seal of the county.

Code, ss. 715, 1342; R. C., c. 44, s. 8; 1792, c. 368, s. 11; 1871-2, c. 91; 1868-9, c. 20, s. 21.

1603. Copies from public records of the state or United States, evidence; how authenticated. All copies of bonds, contracts or other papers relating to or connected with the settlement of any account or any part thereof between the United States and an individual, or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the state or the United States, shall be received in evidence and entitled to full faith and credit in any of the courts of this state when certified to by the chief officer in said office or department to be true copies and authenticated under the seal of said office or department.

1891, c. 501.

NOTE. Pleadings incompetent in criminal prosecutions, see s. 454.

IV. RECORDS, ETC., OTHER STATES.

1604. Records of administration and letters testamentary in other states, how certified. When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of congress or by the proper officer of the said state or territory, shall be allowed as evidence.

Code, s. 1343; R. C., c. 44, s. 7; 1834, c. 4; U. S. Rev. Stat., ss. 905, 906.

1605. Wills or deeds in other states, how proven. In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this state, and the original will or deed can not be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same) being properly certified, either according to the act of congress, or by the proper officer of the said state or territory, shall be read as evidence.

Code, s. 1344; R. C., c. 44, s. 9; 1802, c. 623.

V. COUNSEL AND PHYSICIANS.

1606. Fraud on the state, counsel must testify; proviso. In cases where fraud upon the state is charged it shall not be a sufficient cause to excuse any one from imparting any evidence or information legally required of him, because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud, and any person refusing for such cause to answer any question when legally required so to do shall be guilty of contempt, and punished at the discretion of the court or other body demanding such information: Provided, that it shall not be competent to introduce any admissions thus made on the trial of any persons making the same.

Code, s. 1349; 1874-5, c. 213.

1607. Privilege of attending physicians and surgeons. No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

1885, c. 159.

VI. ACCOUNTS.

1608. Book accounts under sixty dollars, and within two years. When any person shall bring an action upon a contract, or shall plead, or give notice of, a setoff or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of setoff or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book; in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars.

Code, s. 591; R. C., c. 15, s. 1; 1756, c. 57, ss. 2, 6, 7; C. C. P., s. 343a.

1609. Book accounts proved by personal representative. In all actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suit shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party.

Code, s. 592; R. C., c. 15, s. 2; 1756, c. 57, s. 2; 1796, c. 465; C. C. P., s. 343b.

1610. Copies of book accounts evidence, when. A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or setoff as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or ten days before the trial, that he will require the book to be produced at the trial; and in that case no such copy shall be admitted as evidence.

Code, s. 593; R. C., c. 15, s. 3; 1756, c. 57, s. 3; C. C. P., s. 343c.

1611. Itemized accounts evidence, when. In any actions instituted in any court of this state upon an account for goods sold and delivered, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness.

1897, c. 480.

VII. MORTUARY TABLES.

1612. Mortuary tables evidence. Whenever it shall be necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

| Completed Age. | Expectation. | Completed Age. | Expectation. |
|----------------|--------------|----------------|--------------|
| 10 | 43.7 | 53 | 18.8 |
| 11 | 48.1 | 54 | 18.1 |
| 12 | 47.4 | 55 | 17.4 |
| 13 | 46.8 | 56 | 16.7 |
| 14 | 46.2 | 57 | 16.1 |
| 15 | 45.5 | 58 | 15.4 |
| 16 | 44.9 | 59 | 14.7 |
| 17 | 44.2 | 60 | 14.1 |
| 18 | 43.5 | 61 | 13.5 |
| 19 | 42.9 | 62 | 12.9 |
| 20 | 42.2 | 63 | 12.3 |
| 21 | 41.5 | 64 | 11.7 |
| 22 | 40.9 | 65 | 11.1 |
| 23 | 40.2 | 66 | 10.5 |
| 24 | 39.5 | 67 | 10.0 |
| 25 | 38.8 | 68 | 9.5 |
| 26 | 38.1 | 69 | 9.0 |
| 27 | 37.4 | 70 | 8.5 |
| 28 | 36.7 | 71 | 8.0 |
| 29 | 36.0 | 72 | 7.6 |
| 30 | 35.3 | 73 | 7.1 |
| 31 | 34.6 | 74 | 6.7 |
| 32 | 33.9 | 75 | 6.3 |
| 33 | 33.2 | 76 | 5.9 |
| 34 | 32.5 | 77 | 5.5 |
| 35 | 31.8 | 78 | 5.1 |
| 36 | 31.1 | 79 | 4.8 |
| 37 | 30.4 | 80 | 4.4 |
| 38 | 29.6 | 81 | 4.1 |
| 39 | 28.9 | 82 | 3.7 |
| 40 | 28.2 | 83 | 3.4 |
| 41 | 27.5 | 84 | 3.1 |
| 42 | 26.7 | 85 | 2.8 |
| 43 | 26.0 | 86 | 2.5 |
| 44 | 25.3 | 87 | 2.2 |
| 45 | 24.5 | 88 | 1.9 |
| 46 | 23.8 | 89 | 1.7 |
| 47 | 23.1 | 90 | 1.4 |
| 48 | 22.4 | 91 | 1.2 |
| 49 | 21.6 | 92 | 1.0 |
| 50 | 20.9 | 93 | .8 |
| 51 | 20.2 | 94 | .6 |
| 52 | 19.5 | 95 | .5 |

Code, s. 1352; 1883, c. 225.

VIII. COMPETENCY OF WITNESSES.

1613. Not incapacitated by interest or crime. No person offered as a witness shall be excluded by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills.

Code, ss. 589, 1350; C. C. P., c. 342; 1866, c. 43, ss. 1, 4; 1869-70, c. 177; 1871-2, c. 4.

1614. Evidence of parties admissible; exceptions. On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as hereinafter provided, be competent and compellable to give evidence, either viva voce, or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation.

Code, s. 1351; 1866, c. 43, ss. 2, 3.

1615. When one party to transaction is dead. Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is

examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.

Code, s. 590; C. C. P., s. 343.

1616. Executors may testify as to estate in their hands, when; proviso. In all actions now pending or which may be hereafter instituted upon judgments rendered before the first day of August, one thousand eight hundred and sixty-eight, or upon any bond or promissory note under seal executed prior to said date, wherein a reference has been or may be ordered by the court to ascertain the condition or state of the assets belonging to the estate of any deceased debtor in the hands of his administrator or executor, who is or may be defendant in such actions, it shall be competent for the defendant administrator or executor of such deceased debtor to testify and be examined as a witness in his own behalf concerning his administration upon the estate of his intestate or decedent. When in such cases the defendant administrator or executor shall have testified or been examined as a witness in his own behalf, it shall also be competent for the plaintiff to testify and be examined in the same in regard to such administration.

1885, c. 361.

1617. Party examined by adverse party, when. No person who is or shall be a party to an action founded on a judgment rendered before the first day of August, one thousand eight hundred and sixty-eight, or on any bond executed prior to said date, or the assignor, endorser or any person who has at the time of the trial, or ever has had any interest in such judgment or bond, shall be a competent witness on the trial of such action, but this section shall not apply to the trial of any action commenced before the first day of August, one thousand eight hundred and sixty-eight, nor to the trial of any action in which the defendant therein relies upon the plea of payment in fact, or pleads a counterclaim and also introduces himself as a witness to establish the truth of such plea, but in all such cases the rules of evidence as contained in these revised statutes shall prevail.

Code, s. 580; C. C. P., s. 333; 1879, c. 183; 1883, c. 310, ss. 1, 2.

1618. Defendant competent in criminal actions; husband or wife competent for defendant. In the trial of all indictments, complaints or other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, the person so charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him. The husband, or wife of the defendant, in all

criminal actions or proceedings, shall be a competent witness for the defendant; but the failure of such witness to be examined shall not be used to the prejudice of the defense. But every such person examined as a witness shall be subject to be cross-examined as are other witnesses.

Code, s. 1353; 1881, c. 89, s. 3; 1881, c. 110, ss. 2, 3.

1619. Defendant in criminal actions not compellable to give evidence against himself; nor husband or wife against the other. Nothing in this chapter, except as provided in the preceding section, shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense competent, or compellable, to give evidence against himself, nor shall render any person compellable to answer any question tending to criminate himself, nor shall in any criminal proceeding render any husband competent or compellable to give evidence against his wife, nor any wife competent or compellable to give evidence against her husband: Provided, that in all criminal prosecutions of a husband for an assault and battery upon the person of his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the state against the said husband.

Code, s. 1354; 1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, c. 209, s. 4.

1620. Husband and wife witnesses. In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

Code, s. 588; C. C. P., s. 341; 1866, c. 40, s. 2.

1621. Persons testifying in gambling not prosecuted. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery, made by the witness upon such examination, shall be used against

him, in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done, or participated in by him.

Code, s. 1215; R. C., c. 35, s. 50.

Note. See s. 1672.

1622. Lynching, witness must testify; pardoned. In all investigations before a justice of the peace, coroner, judge, grand jury, or courts and jury, on the trial of a cause for lynching, no person shall be excused from testifying touching his knowledge or information in regard to the offense being investigated, upon the ground that his answer might tend to subject him to prosecution, pains or penalties, or that his evidence might tend to criminate himself, but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall when so examined as a witness for the state be altogether pardoned of any and all participation in any crime of lynching concerning which he is required to testify.

1893, c. 461, s. 5.

IX. ATTENDANCE OF WITNESS.

1623. How procured. In obtaining the testimony of witnesses in causes depending in the superior, criminal and inferior courts, the following rules shall be observed in practice, to-wit:

In suits where witnesses are to appear at any court, the clerk at the instance of a party shall issue a subpoena, directed to the sheriff or other officer of the county where such witnesses reside, mentioning the time and place for their appearance, the names of the parties to the suit wherein the testimony is to be given, and the party at whose instance they are summoned. Every subpoena made returnable immediately, shall be issued only in term time, and shall be personally served on the witness therein named. A copy of every subpoena issued by the clerk in vacation, in case any witness therein named is not to be found, may be left at his usual place of residence; and such copy certified by the sheriff or other officer, and left as aforesaid, shall be deemed a legal summons, and the person therein named shall be bound to appear in the same manner as if personally summoned.

Code, s. 1355; R. C., c. 31, s. 59; 1777, c. 115, s. 36.

1624. How procured before jury of view, referee or commissioners. In all cases not otherwise provided for, when witnesses are required to attend any court, commission, referee, order of survey, or jury of view, a summons shall be issued by the clerk of the court, at the request of either party, expressing the day and place

when and where they are to appear, the names of the parties to the suit, and in whose behalf summoned.

Code, s. 1366; R. C., c. 31, s. 68; 1805, c. 685, ss. 1, 2.

1625. When subpœna duces tecum may issue. In all causes depending in any court, in which the production of an original paper, lodged in any of the public offices of the state, or in any office of any court, shall become necessary, the court may issue the process of subpœna duces tecum, requiring such persons who hold said offices to attend the court with such original paper, in like manner and under the same penalties as witnesses are required in cases of subpœna to testify.

Code, s. 1372; R. C., c. 31, s. 81; 1797, c. 476.

1626. Cause removed, subpœnas and commissions to take depositions issued from either county. When any cause shall be removed from the superior court of one county to that of another, after the order of removal, depositions may be taken in the case, and subpœnas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the case had been originally commenced in the court from which the subpœnas or commissions issued.

Code, s. 1371; R. C., c. 31, s. 72; 1810, c. 787; 1832, c. 8.

1627. Witness to attend until discharged; penalty nonattendance, how paid; judgment nisi only. Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and continue to attend from term to term until discharged, when summoned in a civil suit, by the court or the party at whose instance such witness shall be summoned, or when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil cases, to the party at whose instance the subpœna issued, the sum of forty dollars, to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars for the use of the state, or the party summoning him: Provided, that if the civil suit shall, in the vacation, be accommodated and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge, he shall attend at the next term, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party, at whose instance he

was summoned, the allowance which is given to witnesses for their attendance, with costs: Provided further, that no execution shall issue against any defaulting witness for the forfeiture aforesaid, but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness.

Code, s. 1356; R. C., c. 31, ss. 60, 61, 62; 1777, c. 115, ss. 37, 38, 43; 1799, c. 528; 1801, c. 591.

1628. Not arrested in civil cases while attending court. Every witness shall be exempt from arrest in civil cases during his attendance at any court, or before a commissioner, arbitrator, referee or other person authorized to command the attendance of such witness; and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence.

Code, s. 1367; R. C., c. 31, s. 70; 1777, c. 115, s. 44.

X. DEPOSITIONS.

1629. What may be read on the trial. Every deposition taken and returned as prescribed in section sixteen hundred and thirty-six, may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

1. If the witness is dead, or has become insane since the deposition was taken.
2. If the witness is a resident of a foreign country, or of another state, and is not present at the trial.
3. If the witness is confined in a prison outside the county in which the trial takes place.
4. If the witness is so old, sick or infirm as to be unable to attend court.
5. If the witness is the president of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.
6. If the witness is the governor of the state, or the head of any department of the state government, or the president of the university, or the head of any other incorporated college in the state.
7. If the witness is a justice of the supreme court, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court.
8. If the witness is a member of the congress of the United

States, or a member of the general assembly, and the trial shall take place during a session of the body of which he is a member.

9. If the witness has been duly summoned, and at the time of the trial, is out of the state, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

Code, s. 1358; R. C., c. 31, s. 63; 1777, c. 115, ss. 39, 40, 41; 1803, c. 633; 1828, c. 24, ss. 1, 2; 1836, c. 30; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3.

Note. In quo warranto, read when, see s. 1638.

1630. In justices' courts. Any party in a civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action; and to do so, he may apply to the clerk of the superior court for a commission to take the same, and shall proceed in all things in taking such depositions as if such action was pending in the superior court. When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace, before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court.

Code, s. 1359; 1872-3, c. 33.

1631. Not quashed after trial begun. No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection.

Code, s. 1360; 1869-70, c. 227, s. 12.

1632. Objection taken before trial. At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing.

Code, s. 1361; 1895, c. 312; 1903, c. 132; 1869-70, c. 227, ss. 13, 17.

1633. Commissioners may subpoena witness and punish for contempt. Commissioners to take depositions appointed by the courts of this state, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this state, are hereby empowered, they or the clerks of the courts respectively in this state, to which such commission shall be returnable, to issue

subpœnas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness, appearing before any of the said persons, and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto, shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it.

Code s. 1362; R. C., c. 31, s. 64; 1777, c. 115, s. 42; 1805, c. 685, ss. 1, 2; 1848, c. 66; 1850, c. 188.

1634. Attendance before commissioner, how enforced. The sheriff of the county where the witness may be, shall execute all such subpœnas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be summoned five days before the time of his required attendance, and shall fail to appear according to the precept and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner acting under authority from courts without the state, the defaulting witness shall forfeit and pay to the party at whose instance he may be summoned fifty dollars, and on the trial for such penalty, the summons issued by the commissioner, or other person, as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the summons, shall be prima facie evidence of the forfeiture, and sufficient to entitle the plaintiff to judgment for the same, unless the witness may show his incapacity to have attended.

Code, s. 1363; R. C., c. 31, s. 65; 1848, c. 66, s. 2; 1850, c. 188, ss. 1, 2.

1635. Remedies against defaulting witness before commissioner. But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this state, then the same shall be certified under his hand, and returned with the subpœna to the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned, the sum of forty dollars; but execution shall not issue therefor until the same be ordered by the court, after such proceed-

ings had as shall give said witness an opportunity to show cause, if he can, against the issuing thereof.

Code, s. 1364; R. C., c. 31, s. 66; 1850, c. 188, s. 2.

1636. How taken. Any party in a civil action or special proceeding may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States. Written notice of the time and place of taking a deposition, specifying the name of the witness, must be served by the party at whose instance it is taken upon the adverse party or his attorney. The time for serving such notice shall be as follows: Three entire days when the party notified resides within ten miles of the place where the deposition is to be taken; in other cases, where the party notified resides in the state, one day more for every additional twenty miles, except where the deposition is to be taken within ten miles of a railway in running operation in the state, when one day only shall be given for every hundred miles of railway to the place where the deposition is to be taken. When a deposition is to be taken beyond the state, ten days' notice of the taking thereof shall be given, when the party whose deposition is to be taken resides within ten miles of a railway connecting with a line of railway within twenty miles of the place where the person notified resides. In other cases, where there are no railways running as above specified, twenty days' notice shall be given. When objection is taken to the reading of any such deposition, upon the ground that there are no railways or connecting railways to and from the points specified in this section, or that the notice given had otherwise been actually insufficient, it shall devolve upon the party objecting to satisfy the court of the truth of his allegation. Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk. Depositions shall be subscribed and sealed up by the commissioners, and returned to the court, the clerk whereof or the judge holding the court, if the clerk is a party to the action, shall open and pass upon the same, after having first given the parties or their attorneys not less than one day's notice; and all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, or by the judge holding the court, when the clerk is a party to the action, shall be deemed legal evidence, if the witness be competent. In all criminal actions pending before the superior court it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court in which said action is pending that it is important for the defense that he have the testimony of any person or persons, whose names must be given, and that such person or persons are so infirm, or

otherwise physically incapacitated, or nonresident of this state that he can not procure their attendance at court. Upon the filing of said affidavit it shall be the duty of the clerk to appoint some responsible person to take the deposition of said person, which deposition may be read in the trial of said criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor of the district in which said suit is pending have ten days' notice of the taking of said deposition, who may appear in person or by a representative to conduct the cross-examination of such witness.

Code, s. 1357; 1893, cc. 80, 360; 1891, c. 522; R. C., c. 31, s. 63; 1881, c. 279.

1637. How taken in hearings before municipal authorities. Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending for a commission to take the same, and said clerk, upon such application, shall issue such commission; and the notice and proceedings upon the taking of said depositions shall be the same as provided for in civil actions; and if the person upon whom the notice of the taking of such deposition is to be served is absent from or can not after due diligence be found within this state, but can be found within the county in which the deposition is to be taken, then, and in that case, said notice shall be personally served on such person by the commissioner appointed to take such deposition; and when any such deposition is returned to the clerk it shall be opened and passed upon by him and delivered to such board, and the reading and using of such deposition shall conform to the rules of the superior court.

1889, c. 151.

1638. In quo warranto proceedings, how taken. In all cases now pending or hereafter to be brought in any county of this state for the purpose of trying the title to the office of clerk of the superior court, register of deeds, county treasurer or sheriff of any county, it shall be competent and lawful to take the deposition of witnesses before a commissioner or commissioners to be appointed by the judge of the district wherein the case is to be tried, or the judge holding the court of said district, or the clerk of the court wherein the case is pending, under the same rules as to time of notice and as to the manner of taking and filing the same as is now provided by law for the taking of depositions in other cases; and such deposi-

tions, when so taken, shall be competent to be read on the trial of such action, without regard to the place of residence of such witness or distance of residence from said place of trial: Provided, that the provisions of this section shall not be construed to prevent the oral examination of such witnesses by either party on the trial as they may summon in their behalf.

1889, c. 428.

1639. Taken in the state, action in another state. In addition to the other remedies prescribed by law, a party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, either in the United States or any of the possessions thereof, or any foreign country, may obtain by the proceedings prescribed by this section, the testimony of a witness and in connection therewith the production of books and papers within the state to be used in the action, suit or special proceedings. Where a commission to take testimony within the state has been issued from the court in which the action, suit or special proceeding is pending, or where a notice has been given, or any other proceeding has been taken for the purpose of taking the testimony within the state pursuant to the laws of the state or country wherein the court is located, or pursuant to the laws of the United States or any of the possessions thereof, if it is a court of the United States, any justice of the supreme court or judge of the superior court shall, in a proper case, on the presentation of a verified petition, issue a subpoena to the witness, commanding him to appear before the commissioner named in the commission, or before a commissioner within the state, for the state, territory or foreign country in which the notice was given or the proceeding taken, or before the officer designated in the commission, notice or other paper by his title or office, at a time and place specified in the subpoena, to testify in the action, suit or special proceeding. If the witness shall fail to obey the subpoena, or refuse to have an oath administered, or to testify or to produce a book or paper pursuant to a subpoena, or to subscribe his deposition, the justice or judge issuing the subpoena shall, if it is determined that a contempt has been committed, prescribe punishment as in case of a recalcitrant witness. The petition prescribed by this section must state generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of the witness is material to the issue presented in such action or proceeding, and shall set forth the substance of or have annexed thereto a copy of the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpoena to compel the production of books or papers, the petition shall specify the particular books or papers, the production of which is sought, and show that such books or papers are in

the possession of or under control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken. Unless the justice or judge is satisfied that the application is made in good faith to obtain testimony within the provisions of this section, he shall deny the application. Where the subpoena directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner or to produce the original thereof for inspection, but said books and original papers shall not be taken from the witness. This subpoena must be served upon the witness at least two days, or, in case of a subpoena requiring the production of books or papers, at least five days before the day on which the witness shall be commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpoenaed to attend and give his testimony, may apply to the court issuing said subpoena to vacate or modify such subpoena. Upon proof by affidavit that a person to whom a subpoena was issued has failed or refused to obey such subpoena, to be duly sworn or affirmed, to testify or answer a question or questions propounded to him, to produce a book or paper which he has been subpoenaed to produce, or to subscribe to his deposition when correctly taken down, the said justice or judge shall grant an order requiring such person to show cause before him, at a time and place specified, why he should not appear, be sworn or affirmed, testify, answer a question or questions propounded, produce a book or paper, or subscribe to the deposition, as the case may be. Such affidavit shall also set forth the nature of the action or special proceeding in which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the facts to be proved therein. Upon the return of such order to show cause, the said justice or judge, as the case may be, shall, upon such affidavit and upon the original petition and upon such other facts as shall appear, determine whether such persons should be required to appear, be sworn or affirmed, testify, answer the question or questions propounded, produce the books or papers, or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the justice or judge, as the case may be, shall make an order requiring such person to show cause before him, at a time and place therein specified, why such person should not be punished for the offense as for a contempt. Upon the return of the order to show cause, the questions which arise must be determined as upon a motion. If

such failure or refusal is established to the satisfaction of the justice or judge before whom the order to show cause is made returnable, the justice or judge, as the case may be, shall enforce the order and prescribe the punishment as hereinbefore provided. The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this state for attendance upon the superior courts, and from such deposit said commissioner shall retain whatever amount may be due him for services, pay such witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands he shall pay the same to the party by whom it was advanced.

1903, c. 608.

XI. WRITINGS, PRODUCTION, INSPECTION.

1640. Inspection before trial. The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; C. C. P., s. 331; 1828, c. 7.

1641. Production on trial. The courts shall have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default.

Code, s. 1373; R. C., c. 31, s. 25; 1821, c. 1095; 1828, c. 7.

1642. Admission of genuineness procured. Either party may exhibit to the other, or to his attorney at any time before the trial, any paper material to the action, and request an admission in writ-

ing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal.

Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; 1828, c. 7; C. C. P., s. 331.

XII. CONFEDERATE CURRENCY.

1643. Scale of depreciation. Contracts solvable in Confederate currency may be discharged according to the following scale of depreciation of Confederate currency, the gold dollar being the unit and measure of value, from November first, one thousand eight hundred and sixty-one, to May first, one thousand eight hundred and sixty-five:

| Months. | 1861. | 1862. | 1863. | 1864. | 1865. |
|---------------------------------|---------|---------|---------|---------|----------|
| January ----- | \$----- | \$ 1.20 | \$ 3.00 | \$21.00 | \$ 50.00 |
| February ----- | ----- | 1.30 | 3.00 | 21.00 | 50.00 |
| March ----- | ----- | 1.50 | 4.00 | 23.00 | 60.00 |
| April ----- | ----- | 1.50 | 5.00 | 20.00 | 100.00 |
| May ----- | ----- | 1.50 | 5.50 | 19.00 | |
| June ----- | ----- | 1.50 | 6.50 | 18.00 | |
| July ----- | ----- | 1.50 | 9.00 | 21.00 | |
| August ----- | ----- | 1.50 | 14.00 | 23.00 | |
| September ----- | ----- | 2.00 | 14.00 | 25.00 | |
| October ----- | ----- | 2.00 | 14.00 | 26.00 | |
| November ----- | 1.10 | 2.50 | 15.00 | 30.00 | |
| December ----- | 1.15 | 2.50 | 20.00 | ----- | |
| “ 1st to 10th, inclusive ----- | ----- | ----- | ----- | 35.00 | |
| “ 10th to 20th, inclusive ----- | ----- | ----- | ----- | 42.00 | |
| “ 20th to 30th, inclusive ----- | ----- | ----- | ----- | 49.00 | |

This scale applies to the time of contracting and not to the times said debts become due.

Code, ss. 2495, 2496; 1866, c. 39, s. 1; 1866-7, c. 44.

NOTE. For evidence in indictment for enticing minors from state, see Crimes.

For evidence in cases of hunting by night, see Crimes.

For evidence necessary in cases of disposing of mortgaged property, see Crimes.

For evidence in indictments for secreting seamen, see Crimes.

For students as witnesses against lewd women, see Crimes.

For evidence to convict of seduction, see Crimes.

For what necessary to allege and prove in prosecutions for selling seed cotton, see Crimes.

For evidence in prosecution for selling liquor in local option territory, see Crimes.

For evidence in cases of gaming, see Gaming Contracts.

For evidence in suits against sureties on official bonds, see Bonds.

For recitals in tax deeds as evidence, see Taxes, Collection of.

See Burnt and Lost Records.

For proof of loss of baggage, see Innkeepers, s. 1891.

For certified copies of judgments as evidence, see s. 529.

See Commissioners of Affidavits.

Vouchers evidence of payment by administrator, see Administration, s. 100.

For evidence against principal as against surety, see s. 251a.

CHAPTER 35.

FENCES AND STOCK LAW.

| | Sections. |
|-------------------|-----------|
| I. Lawful fences, | 1644—1647 |
| II. Joint fences, | 1648—1655 |
| III. Stock law, | 1656—1670 |

I. LAWFUL FENCES.

1644. Fences to be five feet high. Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless otherwise provided in this chapter, unless there shall be some navigable stream or deep watercourse that shall be sufficient, instead of such fence, and unless his lands shall be situated within the limits of a county, township or district wherein the stock law may be in force.

Code, s. 2799; R. C., e. 48, s. 1; 1777, c. 121, s. 2; 1791, e. 354, s. 1.

1645. Four and a half feet in certain counties. A fence four and one-half feet high shall be a lawful fence in the counties of Cumberland, Currituck, Cherokee, Burke, Rutherford, Yancey, Wilkes, Caldwell, Duplin, Jackson, Alleghany, Davidson, Harnett, Henderson, Wake, Craven, Richmond, Davie, Bladen, Northampton, Washington, Randolph, Robeson, Tyrrell and Lenoir: Provided, this section shall not apply to stock law fences.

1889, e. 175; 1891, e. 36; 1891, e. 233.

1646. Four feet in certain counties. A fence four feet high shall be a lawful fence in the counties of Carteret, Pamlico, Hyde, New Hanover, Buncombe, Madison and McDowell.

1885, e. 304; 1887, e. 66; 1889, e. 390; 1903, e. 66; 1903, e. 211.

1647. Water-courses, on application to commissioners, made. Any five electors, residents of the same county, may apply to the

board of commissioners of the county, at any regular meeting of the same, by written petition praying that any water-course, or any part of any water-course, in the county, may be made a lawful fence. Notice of such petition shall be posted forty days at the courthouse door, by the clerk of the board before such petition shall be acted upon. Upon the hearing of such petition, the board of county commissioners is authorized to declare any water-course, or any part of any water-course to which the petition applies, a lawful fence. And the several acts of the general assembly, declaring certain water-courses, in part or in whole, lawful fences, are so far repealed as to enable the board of commissioners of any county to declare any of such acts, or parts thereof, to be null and void in said county. Any order made under this section shall be of record and signed by the chairman, and may be rescinded by the board of commissioners at any regular meeting.

Code, ss. 2808, 2809, 2810; 1872-3, c. 98.

II. JOINT FENCES.

1648. Jointly maintained. Where two or more persons shall have lands adjoining, which shall be either cultivated or used as a pasture for stock, the respective owners of each piece of land shall make and maintain one-half of the fence upon the dividing line.

Code, s. 2800; 1868-9, c. 275, s. 1.

1649. Jointly paid for, when. Where the owner of one piece of land shall have chosen neither to cultivate his land, nor to pasture, nor to permit his stock to run on it, if he shall afterwards do either, without so enclosing such stock that they can not enter on the lands of such adjoining owner, he shall refund to such owner one-half the value at that time of any fence erected by him on the dividing line.

Code, s. 2801; 1868-9, c. 275, s. 2.

1650. Value of dividing fence ascertained, how. The value of such fence shall be ascertained as follows: Either owner may summon the other to appear before any justice of the peace of the township in which the dividing line is situate; or if it be situate in more than one township, then before any justice of the peace of any township in which any part of it is situate. In his summons he shall name a certain day, not less than five days after the summons, for the appearance of the defendant; he shall also state the purpose of the summons to be the adjustment of all matters in controversy respecting the dividing fence between the parties. The justice shall hear the complaint and defense. If the facts be found such as entitle either party to demand contribution of the other, the justice shall call on the complainant to name an indifferent person, qualified to

act as a juror of the township, and if the complainant refuses the justice shall name one for him. The justice shall then call on the defendant to name an indifferent person, qualified to act as a juror of the township, and if the defendant refuses the justice shall name one for him. The justice shall then name a third indifferent person. These three persons, or any two of them, shall view the premises and decide all matters in controversy between the parties, relating to a fence on the dividing line. They shall make a written report to the justice, who shall give judgment thereon, and for the costs, which shall be paid by the owners of the several pieces of land equally. The jurors shall each receive one dollar per day. The fees of the justice and constable shall be as in other cases. Either party may appeal as provided in other cases of justices' judgments.

Code, s. 2803; 1868-9, c. 275, s. 3.

1651. Jurors to report how fence kept up. The report of the jurors shall also state the kind of fence which ought to be kept up, and assign to each owner, in such manner as that it may be identified, the part which he shall keep up.

Code, s. 2804; 1868-9, c. 275, s. 4.

1652. Report registered by register of deeds. The justice shall return the report, together with a transcript of the proceedings, to the register of deeds of his county for registration. The justice shall collect from the parties the fees of the register, and pay the same to him.

Code, s. 2805; 1868-9, c. 275, s. 5.

1653. Final judgment binding. The final judgment upon the report of the jurors shall be binding on the owners of the respective lands and their assigns, so long as such ownership shall continue, or until the same shall be set aside, modified or reversed.

Code, s. 2806; 1868-9, c. 275, s. 6.

1654. Remedy against delinquent owner. If any person who is liable to build or keep up a part of any division fence, shall fail at any time to do so, the owner of the adjoining land, after notice, may build or repair the whole, and recover of the delinquent one-half of the cost before any court having jurisdiction.

Code, s. 2807; 1868-9, c. 275, s. 7.

1655. How removed. If any owner of land liable to contribute for the keeping up of a division fence, shall determine neither to cultivate his land nor permit his stock to run thereon, he may give the adjoining owner three months' notice of his determination; and in that case, at any time after the expiration of such notice, and between the first day of January and the first day of March, but at

no other time, he may remove the half of the fence kept up by himself, and shall be no longer liable to keep up the same.

Code, s. 2802; 1903, c. 20; 1868-9, c. 275, s. 8; 1883, c. 111.

NOTE. Removal of joint fence a misdemeanor, see Crimes.

III. STOCK LAW.

1656. County elections. Upon the written application of one-fifth of the qualified voters of any county made to the board of commissioners thereof, it shall be the duty of said commissioners from time to time to submit the question of "stock law" or "no stock law" to the qualified voters of said county. And if at any such election a majority of the votes cast shall be in favor of said stock law, then the provisions of this chapter relating to the stock law shall be in force over the whole of said county.

Code, s. 2812.

1657. Township elections. Upon the written application of one-fifth of the qualified voters in any township, made to the board of commissioners of the county wherein said township is situated, it shall be the duty of said commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of said township; and if at any such township election a majority of the votes cast shall be in favor of "stock law," then the said stock law shall be in force in said township.

Code, s. 2813.

1658. District elections. Upon the written application of one-fifth of the qualified voters of any district or territory, whether the boundaries of said district follow township lines or not, made to the board of county commissioners at any time, and setting forth well-defined boundaries of said district, it shall be the duty of the said commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of said district, and if at any such election a majority of the votes cast shall be in favor of "stock law," then the said stock law shall be in force over the whole of said district.

Code, s. 2814.

1659. Persons within territory allowed to withdraw. Upon the written application of a majority of the qualified voters in any district, territory or well-defined boundary, made to the board of county commissioners, at any time, setting forth that the citizens of said district, territory or boundary are within the stock law boundary, and are desirous of being released from the laws governing said stock law territory, it shall be the duty of said commissioners to submit the question of "no stock law" or "stock law" to the qualified voters

of said district or territory, and if at any such election a majority of the votes cast shall be against stock law, then the said district or territory shall be released and free from the operation of the stock law: Provided, the expense incurred in changing the fence in such boundary, district or territory so released be paid by the property holders in such boundary, district or territory, and that the commissioners of the county levy the tax to pay the same on the property holders of such boundary, district or territory so released, but they shall not be further liable for keeping up said stock law fence: Provided, that in any territory where stock law now prevails no election against stock law shall be held in less than two years from the date of the election adopting stock law in said territory: Provided further, that if "no stock law" should carry, it shall not take effect until six months from the date of its ratification: Provided still further, that neither "stock law" or "no stock law" shall take effect during crop season. This section shall apply only to the counties of Jackson, Graham, Swain, Clay, Macon, Cherokee and Randolph.

1895, c. 35; 1897, cc. 461, 516; 1903, c. 60.

1660. Elections, how held. Every election under this chapter shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the general assembly: Provided, no such county, township or district election shall be held oftener than once in any one year, although the boundaries of such district may not be the same.

Code, s. 2815.

1661. Powers and duties of commissioners. The board of commissioners of the county may provide for a new registration of voters, designate places for holding elections, and make all regulations, and do all other things necessary to carry into effect the provisions of this chapter relating to the stock law.

Code, s. 2826.

1662. Land adjoining stock law territory. Any person, or any number of persons, owning land in a county, district or township, which shall not adopt the stock law, or adjoining any county, township or district where a stock law prevails, may have his or their lands enclosed within any fence built in pursuance of this chapter. All such adjacent lands, when so enclosed, shall be subject to all the provisions of law with respect to live stock running at large within the original district so enclosed, as if it were a part of the township, county or district with which it is hereby authorized to be enclosed. Any number of land owners, whose lands are contiguous, may at any time build a common fence around all their lands, with gates across all public highways; and no live stock shall run at

large within any such enclosure, under the pains and penalties prescribed in this chapter.

Code, s. 2821.

1663. Stock not to run at large, impounded. Any person may take up any live stock running at large within any township or district wherein the stock law shall be in force and impound the same; and such impounder may demand fifty cents for each animal so taken up, and twenty-five cents for each animal for every day such stock is kept impounded, and may retain the same, with the right to use it under proper care until all legal charges for impounding said stock and for damages caused by the same are paid, said damages to be ascertained by two disinterested freeholders, to be selected by the owner and said impounder, said freeholders to select an umpire, if they can not agree, and their decision to be final.

Code, s. 2816.

1664. Owner notified; sale of stock; application of proceeds. If the owner of said stock be known to such impounder he shall immediately inform such owner where his stock is impounded, and if said owner shall for two days after such notice wilfully refuse or neglect to redeem his stock, then the impounder, after ten days' written notice posted at three or more public places within the township where said stock is impounded, and describing the said stock and stating place, day and hour of sale, or if the owner be unknown, after twenty days' notice in the same manner, and also at the courthouse door, shall sell the stock at public auction, and apply the proceeds in accordance with the preceding and succeeding sections, and the balance he shall turn over to the owner if known; and if the owner be not known, to the county commissioners for the use of the school fund of the district wherein said stock was taken up and impounded, subject in their hands for six months to the call of the legally entitled owner.

Code, s. 2817.

1665. Stock defined. The word "stock" in this chapter shall be construed to mean horses, mules, colts, cows, calves, sheep, goats, jennets, and all neat cattle, swine and geese.

Code, s. 2822.

1666. Impounded stock may be fed; pay for same. In case any animal shall be at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person from time to time, and as often as it shall be necessary, to enter into and upon any such pound or other place, in which any animal shall be so confined, and to supply it with necessary food and water so long

as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal.

Code, s. 2485; 1881, c. 368, s. 4.

1667. Fence built around territory. The stock law authorized by this chapter shall not be enforced until a fence shall have been erected around any territory proposed to be enclosed, with gates on all the public roads passing into and going out of said territory: Provided, all streams which are or may be declared to be lawful fences shall be sufficient boundaries, in lieu of fences: Provided further, no fence shall be erected along the boundary lines of any county, township or district where a stock law prevails.

Code, s. 2823.

1668. Lawful fence in stock law territory. In any county in the state in which or in any portion of which the stock law is now in force or may hereafter be adopted, the county commissioners of said county in their discretion may declare any water-course, mountain, mountain ranges or parts of same, and also other natural and sufficient obstruction along the line of said stock law territory to be and constitute a sufficient stock law fence, and in that event such water-course, mountain, mountain range or part thereof and obstructions so declared by said commissioners shall be and constitute a lawful fence to all intents and purposes.

1901, c. 542.

1669. Fence built by assessment on land owners. For the purpose of building stock law fences, the board of commissioners of the county may levy and collect a special assessment upon all real property, taxable by the state and county, within the county, township or district which may adopt the stock law, but no such assessment shall be greater than one-fourth of one per centum on the value of said property.

Code, s. 2824.

1670. Land condemned. If the owner of any land shall object to the building of any fence herein allowed, his land, not exceeding twenty feet in width, shall be condemned for the fenceway as land is condemned for railroad purposes under the chapter entitled *Railroads*.

Code, s. 2825.

NOTE. Allowing stock to run at large in stock law territory, see *Crimes*.

Misapplication of funds by impounder, see *Crimes*.

Releasing impounded stock, see *Crimes*.

Injuring fences and leaving gates open, see *Crimes*.

Persons living in stock law territory allowing stock to run at large outside said territory, see *Crimes*.

Trespassing on lands along roadway, see *Crimes*.

Wilful riding or driving on land, see *Crimes*.

CHAPTER 36.

GAMING CONTRACTS.

(Sections 1671—1674.)

1671. Gaming and betting contracts void. All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void.

Code, s. 2841, 2842; R. C., c. 51, ss. 1, 2; 1810, c. 796.

1672. Players and betters competent witnesses. No person shall be excused or incapacitated from confessing or testifying touching any money or property, or thing in action, so wagered, bet or staked, or lent for such purpose, by reason of his having won, played, bet or staked upon any game, lot or chance, casualty, or unknown or contingent event aforesaid; but the confession or testimony of such person shall not be used against him, in any criminal prosecution, on account of such betting, wagering or staking.

Code, s. 2843; R. C., c. 51, s. 3.

Note. See s. 1621.

1673. Certain contracts for future delivery void. Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, at a place and at a time specified and agreed upon therein, to any other person whether the person to whom such article is so agreed to be sold and delivered shall be a party to such contract or not when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other

thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered; and every contract commonly called "futures" as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void; and no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the state, or partly in and partly out of this state, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency.

1889, c. 221, s. 1.

1674. Invalidity pleaded shifts burden of proof; plea and proof not used in criminal action. When the defendant in any action pending in any court shall allege specifically in his answer that the cause of action alleged in the complaint is in fact founded upon a contract such as is by this chapter made void, and such answer shall be verified, then the burden shall be upon the plaintiff in such action to prove by the proper evidence, other than any written evidence thereof, that the contract sued upon is a lawful one in its nature and purposes; and the defendant may likewise produce evidence to prove the contrary: Provided, nevertheless, that any allegation or statement of fact made in any pleading in any such action, or the evidence produced on the trial in any such action, shall not be evidence against the party making or producing the same in any criminal action against such party.

1889, c. 221, s. 2.

NOTE. For punishment for dealing in futures, see Crimes.

CHAPTER 37.

GRANTS.

| | Sections. |
|--------------------------|-----------|
| I. To whom issued, | 1675 |
| II. What may be granted, | 1676—1682 |
| III. Entry-taker, | 1683—1689 |
| IV. Entries, | 1690—1695 |
| V. Surveys, | 1696—1704 |
| VI. Grants, | 1705—1713 |
| VII. Correcting, | 1714—1724 |
| VIII. Grants vacated, | 1725—1727 |
| IX. Phosphate beds, | 1728—1734 |

I. TO WHOM ISSUED.

1675. Citizens and bona fide residents. Any citizen of this state, and all persons who have or shall come into the state with the bona fide intent of becoming residents and citizens thereof, shall have the right and privilege of making entries of, and obtaining grants for, vacant and unappropriated lands.

Code, s. 2754; 1869-70, c. 19, s. 1.

II. WHAT MAY BE GRANTED.

1676. Land subject to. All vacant and unappropriated lands, belonging to the state, shall be subject to entry by any citizen thereof, in the manner hereinafter provided, except—

1. Lands covered by navigable waters.

2. Lands covered by the waters of any lake, or which, though now covered, may hereafter be gained therefrom by the recession, draining, or diminution of such waters, or have been so gained heretofore, and not lawfully entered.

3. Marsh or swamp land, where the quantity of land in any one marsh or swamp exceeds two thousand acres, or where, if of less quantity, the same has been surveyed by the state, or by the state board of education, with a view to draining and reclaiming the same.

Code, s. 2751; R. C., c. 42, s. 1; 1854-5, c. 21.

1677. What swamp lands may be. Marsh or swamp lands, lying in a swamp where the quantity of land in that swamp or marsh does not in the whole swamp or marsh exceed two thousand acres, and which has not been surveyed by the state or state board of education, and marsh or swamp lands, unsurveyed as aforesaid, not exceeding

fifty acres in one body, though lying within a marsh or swamp of a greater number of acres than two thousand, may be entered, when the same shall be situated altogether between the lines of tracts heretofore granted.

Code, s. 2751; R. C., c. 42, s. 1; 1854-5, c. 21.

1678. Swamp lands defined. The words "marsh and swamp land" wherever employed in this chapter, and the words "swamp lands" employed in the statutes creating the literary fund and literary board of North Carolina and the state board of education of North Carolina, or in any act in relation thereto, shall be construed to include all those lands which have been or may now be known and called "swamp" or "marsh" lands, "pocosin bay," "briary bay" and "savanna," and all lands which may be covered by the waters of any lake or pond.

1891, c. 302.

1679. Land covered by water, for wharves. Persons owning lands on any navigable sound, river, creek or arm of the sea, for the purpose of erecting wharves on the side of the deep waters thereof, next to their lands, may make entries of the lands covered by water, adjacent to their own, as far as the deep water of such sound, river, creek, or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines, including only the fronts of their own tracts, and shall in no respect obstruct or impair navigation. When any such entry shall be made in front of the lands in any incorporated town, the town corporation shall regulate the line on deep water, to which wharves may be built. This shall not affect existing rights. For all lands thus entered there shall be paid into the treasury not less than one dollar per acre. When any person shall have erected a wharf on public lands of the description aforesaid, before the first day of January, one thousand nine hundred and three, such person shall have liberty to enter said land, including his wharf, under the restrictions and upon the terms above set forth: Provided, no land covered by water shall be subject to entry within thirty feet of any wharf, pier or stand used as a wharf already in existence, or which may hereafter be erected by any person on his own land or land under his control, or on an extended line thereof; but land covered by water as aforesaid for the space of thirty feet from the landing place on line of any wharf, pier or stand used as a wharf, as aforesaid, shall remain open for the free ingress and egress of said owner and other persons to and from said wharf, pier or stand: Provided further, no person shall be allowed to enter and obtain a grant for any land in the waters of Onslow county, in which the tide ebbs and

flows, within thirty feet of the shore at low-water mark, unless the enterer shall be the owner of the adjacent shore.

Code, s. 2751; R. C., c. 42, s. 1; 1854-5, c. 21; 1889, c. 555; 1893, c. 17; 1893, c. 4; 1893, c. 349; 1901, c. 364; 1891, c. 532.

1680. Fisheries established. Whenever any person shall acquire title to lands covered by navigable water as required by law for wharves, the owner or person so acquiring title shall have the right to establish fisheries upon said lands; but this right shall not authorize any person to obstruct navigation.

Code, s. 2752; 1874-5, c. 183, ss. 1, 6.

1681. Prior right of fishery in whom. Whenever the owners of lands covered by navigable waters shall improve the same by clearing off and cutting therefrom logs, roots, stumps or other obstructions, so that the said land may be used for the purpose of drawing or hauling nets or seines thereon for the purpose of taking or catching fish, then and in that case the person who makes or causes to be made the said improvements, his heirs and assigns, shall have prior right to the use of the land so improved, in drawing, hauling, drifting or setting nets or seines thereon, and it shall be unlawful for any person, without the consent of such owner, to draw or haul nets or seines upon the land so improved by the owner thereof for the purpose of drawing or hauling nets or seines thereon. This section shall apply where the owner of such lands shall erect, or shall have erected, platforms or structures of any kind thereon to be used in fishing with nets and seines.

Code, s. 2753; 1874-5, c. 183, ss. 2, 3, 4.

1682. What void; not color of title. Every entry made, and every grant issued, for any lands not authorized by this chapter to be entered or granted, shall be void; and every grant of land made since the sixth day of March, one thousand eight hundred and ninety-three, in pursuance of the statutes regulating entries and grants shall, if such land or any portion thereof has been heretofore granted by this state, so far as relates to any such land heretofore granted, be absolutely void for all purposes whatever, shall confer no rights whatever upon the grantee or grantees therein or those claiming under such grantee or grantees, and shall in no case and under no circumstances constitute any color of title whatsoever to any person whomsoever.

Code, s. 2755; 1893, c. 490; R. C., c. 42, s. 2.

III. ENTRY-TAKER.

1683. How elected; term of office. The board of commissioners of the several counties shall elect one person to receive entries of claims for lands within each county; and such entry-taker shall hold his office for four years.

Code, s. 2756.

1684. Register of deeds acts as, when. When a vacancy exists in the office of entry-taker, the register of deeds shall act as entry-taker until such vacancy is filled by an election by the commissioners. The register of deeds, in such case, shall take charge of the books belonging to the office, shall discharge all the duties and receive the emoluments, and shall be subject to the rules, regulations and penalties prescribed for entry-takers.

Code, s. 2757; 1868-9, c. 100, s. 2; 1868-9, c. 173, s. 2.

1685. Who issues warrant on death of entry-taker. In all cases where an entry shall be made, and the entry-taker shall die or resign before a warrant shall be issued thereupon, his successor shall issue a warrant.

Code, s. 2772; R. C., c. 42, s. 15; 1835, c. 19.

1686. Oath of office; fees. The entry-taker shall take the oath of office and receive the fees, and no other, prescribed in the chapters respectively entitled Oaths and Salaries and Fees.

Code, s. 2760; 1868-9, c. 173, s. 5.

1687. Office of entry-taker at courthouse. The entry-taker shall keep his office at the courthouse of his county, or within one mile thereof, on pain of forfeiting one hundred dollars to the county, to be sued for by the county treasurer.

Code, s. 2759; 1868-9, c. 173, s. 4.

1688. Makes annual returns. Every entry-taker shall make return to the secretary of state annually, on the first day of January, of all lands entered with him, under a penalty of two hundred dollars.

Code, s. 2775; R. C., c. 42, s. 18; 1796, c. 455, s. 9; 1881, c. 265.

1689. Penalty failing to make returns, how recovered. The secretary of state shall furnish the attorney general, at every spring term of the superior court of Wake county, with a certificate of failure in every case where an entry-taker shall fail to make return according to law; and the attorney general shall move for judgment against such entry-taker and his sureties, and the courts shall give judgment accordingly.

Code, s. 2776; R. C., c. 42, s. 19; 1833, c. 15.

IV. ENTRIES.

1690. In writing, and describe land. The claimant of land shall produce to the entry-taker a writing, signed by such claimant, setting forth where the land is situated, the nearest water-courses and remarkable places, and such water-courses and remarkable places as may be therein, the natural boundaries and the lines of any other person, if any, which divide it from other lands; and every such writing shall be one-quarter sheet of paper at least.

Code, s. 2765; 1903, c. 272, s. 3; R. C., c. 42, s. 11; 1777, c. 114, s. 5; 1783, c. 185, s. 11; 1885, c. 132; 1891, c. 70; 1893, cc. 120, 270.

1691. Duty of entry-taker. The entry-taker shall immediately endorse the same with the name of the claimant, the number of acres claimed, and date of the entry; and shall copy the same in a book well bound, and ruled with a large margin into spaces of equal distance, each space to contain one entry only, and every entry to be made in the order of time in which it shall be received, and numbered in the margin. The entry-taker shall thereupon cause a copy of the entry to be posted for thirty days at three public places in the township or townships in which the land covered by the entry is located. A copy of the entry shall also be posted for thirty days at the courthouse door of the county in which such land lies, and advertised for thirty days in a newspaper published at the county seat of such county. If there be no newspaper published in such county, then the advertisement provided for shall be made in the nearest newspaper.

Code, s. 2765; 1903, c. 272, s. 3.

1692. Protest filed, when and by whom. If any person shall claim title to or an interest in the land covered by the entry, or any part thereof, he shall, within the time of advertisement as above provided, file his protest in writing with the entry-taker against the issuing of a warrant thereon; and upon the filing of such protest, the entry-taker shall certify copies of the entry and protest to the superior court, and thereupon a notice shall be issued by the clerk of the superior court to the claimant, commanding him to appear at the next term of said court and show cause why his entry shall not be declared inoperative and void.

Code, s. 2765; 1903, c. 272, s. 3.

1693. When entry lapses, subsequent entry valid. Whenever an entry of land shall be made in any entry-taker's office, and the enterer shall fail to have the land surveyed and pay the price for the same, within the time limited by law, any person who may have made

a subsequent entry for the same land may have the same surveyed and pay the price and have a grant.

Code, s. 2767; R. C., c. 42, s. 9; 1809, c. 771.

1694. When for benefit of entry-taker. If any entry-taker shall desire to make an entry in his own name, the same shall be made in its proper place, before a justice of the peace of the county, not being a surveyor or assistant; which entry the justice shall return to the next meeting of the board of county commissioners, who shall insert it; and every entry made by or for such entry-taker, in any other manner, shall be void.

Code, s. 2773; R. C., c. 42, s. 16; 1777, c. 114, s. 17.

1695. Lapsed entries, not renewed within one year. No lands entered on the books of the entry-taker, the entry of which shall be suffered to lapse by nonpayment of the price thereof, shall be re-entered within one year after the time at which such entry shall lapse, by the person in whose name such entry was made, but such re-entry shall be void.

Code, s. 2768; R. C., c. 42, s. 10.

V. SURVEYS.

1696. When warrant for survey issued. If no protest be filed, or where the protest is filed, and the right of the claimant to make the entry is sustained, the entry-taker shall deliver to the party a copy of the entry with its proper number and a warrant to the surveyor to survey the same, which warrant shall contain a copy of the entry with its number and date, and a certificate that notice has been given as above provided, and that no protest has been filed, or that protest has been filed and that the court has decided in favor of the claimant. Each warrant shall be delivered to the surveyor in the order of time in which the entry was made.

Code, s. 2765; 1903, c. 272, s. 3.

1697. Duplicate warrants. When any person shall duly make an entry of lands which shall not have become void by lapse of time, and upon which the entry-taker shall issue his warrant of survey, and the same be lost by accident, the entry-taker, on due proof being made to his satisfaction, by affidavit of the claimant or the surveyor or deputy surveyor, may issue a duplicate warrant of survey, of the same tenor and date, taking care to set forth, on the face of said warrant, that the same is a duplicate; in which case such warrant shall be made as valid as the original.

Code, s. 2771; R. C., c. 42, s. 14; 1814, c. 878, s. 1.

1698. Order of survey. The surveyor shall survey all entries of land according to the priority of entry, paying due respect to the number of each warrant; and every grant obtained by any subsequent entry, otherwise than is by this chapter directed, shall be void: Provided, nothing herein shall be construed to prevent any person who shall make a subsequent entry from surveying and obtaining a grant, as the law directs, for all such surplus land as shall remain, after the enterer of such land hath surveyed his entry as aforesaid.

Code, s. 2770; R. C., c. 42, s. 13; 1787, c. 279.

1699. How made. Every county surveyor, upon receiving the copy of the entry and order of survey for any claim of lands, shall, within ninety days, lay off and survey the same agreeably to this chapter; and make thereof two fair plots, the scale whereof and the number of the entry shall be mentioned on such plots; and shall set down in words the beginning, angles, distances, marks and water-courses, and other remarkable places crossed or touched by or near to the lines of such lands, and also the quantity of acres; and land lying on any navigable water shall be surveyed in such manner that the water shall form one side of the survey, and the land be laid off back from the water.

Code, s. 2769; 1903, c. 272, s. 4; R. C., c. 42, s. 12; 1777, c. 114, s. 10.

1700. Sworn chainbearers. No survey for the purpose of obtaining a grant shall be made until the chainbearers shall be sworn to measure justly and truly, and to deliver a true account thereof to the surveyor. The chainbearers shall actually measure the land surveyed. The surveyor is empowered to administer the oath.

Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10.

1701. Plots made and transmitted to secretary of state. The surveyor shall, within one year, transmit the plots, together with the warrant or order of survey, to the office of the secretary of state, or deliver them to the claimant.

Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10.

1702. Special surveyor, when and how appointed. When the office of county surveyor is vacant, the county commissioners may appoint a special surveyor to survey any lands that may be entered; and the plots and certificates of such special surveyor, accompanied by a copy of the order of the county commissioners appointing him, shall be held valid, as if done by a county surveyor duly elected.

Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10.

1703. May appoint deputies. Every surveyor may appoint deputies, who shall, previous to entering on the duties of their office, be qualified in a similar manner with the surveyor; and the surveyor

making such appointment shall be liable for the conduct of such deputies, as for his own conduct in office.

Code, s. 2763; R. C., c. 42, s. 6; 1779, c. 140, s. 5.

1704. When county surveyor interested. When a county surveyor shall wish to have lands surveyed in a county where he acts as principal surveyor, for the purpose of obtaining a grant, the board of county commissioners of said county shall appoint some person to make the survey, and the entry-taker shall direct his warrant of survey to such person; and all certificates, surveys and plots of the same shall be made under the same regulations as prescribe the duty of the county surveyor in similar cases.

Code, s. 2774; R. C., c. 42, s. 17; 1828, c. 23.

VI. GRANTS.

1705. When secretary of state may withhold grant. When application is made for a grant if the secretary of state has reason to believe that the land covered by any entry and the surveys made in pursuance of the same is the property of the state board of education, he may, in his discretion, withhold the issuance of a grant for same until the engineer of the state board of education or surveyor appointed by said board shall have examined into the matter and made his report. And if said engineer or surveyor shall report that the lands in question are the property of the state board of education and not subject to entry, the secretary of state shall not issue a grant on such entry and surveys. If the secretary of state shall have reason to believe that the land for which a grant is sought has already been granted and does not belong to the state, he shall not issue grant for the same until it appears to his satisfaction that the land does belong to the state and is subject to entry.

1903, c. 272, s. 3.

1706. On what grant issued. No grant shall issue on the treasurer's receipt for the money; but the auditor shall make out and deliver to the secretary of state a certificate, conformable to each receipt by him countersigned, on which the secretary shall issue the grant.

Code, s. 2778; R. C., c. 42, s. 21; 1799, c. 525, s. 4.

1707. When, how and to whom issued. The secretary, on application of claimants, shall make out grants for all surveys returned to his office, which grants shall be authenticated by the governor, countersigned by the secretary and recorded in his office. The date of the entry shall be inserted in every grant, and no grant shall issue upon any survey, unless the same be signed by the surveyor of

the county; and every person obtaining a grant for land shall, within two years after such grant shall be perfected as aforesaid, cause the same to be registered in the county where the land shall lie; and any person may cause to be there registered any certified copy of a grant from the office of the secretary of state, which shall have the same effect as if the original had been registered. Upon certificate from the entry-taker that the claimant has assigned his interest under the entry, a grant shall be issued in the name of the assignee: Provided, that the said assignee is a citizen and resident of this state, or shall have come into the state with the bona fide intent of becoming a resident and citizen thereof.

Code, s. 2779; R. C., c. 42, s. 22; 1783, c. 185, s. 14; 1796, c. 455; 1799, c. 525, s. 2.

1708. Claimant dying, right descends. In case of the death of any person having made an entry of lands, pending the same or before making out the grant, the secretary shall issue the grant in the name of the decedent; and those interested, as heirs at law, devisees, tenants in dower, by the courtesy or otherwise, shall have the same estate as if the land had been granted during the life of the decedent.

Code, s. 2780; R. C., c. 42, s. 23; 1715, c. 4, s. 6; 1798, c. 493, s. 6.

1709. When entry price paid. All entries of land shall, in every event, be paid for within one year from the date of entry, unless a protest be filed to the entry, in which event they shall be paid for within twelve months after final judgment on the protest; and all entries of land, not thus paid for, shall become null and void, and may be entered by any other person.

Code, s. 2766; R. C., c. 42, s. 8; 1854-5, c. 49.

1710. Price paid state treasurer, when. The state treasurer shall receive the money for vacant and unappropriated lands upon the presentation to him of the certificate of the secretary of state, setting forth the number and date of the entry, and the quantity of acres found by the surveyor to be vacant, as the same may appear by the returns made to him from the surveyor or entry-taker, or from the entry-taker's warrant, or the plots of survey.

Code, s. 2777; R. C., c. 42, s. 20; 1827, c. 23; 1829, c. 30.

1711. Price of land; may be sold to other than claimant. Not less than fifty cents shall be paid to the state treasurer for every acre of land that may be entered, and the secretary of state may in his discretion charge a greater sum, and is authorized to issue a grant to any person other than the claimant if the claimant refuses to pay the sum bona fide offered by such other person. In case the land is sold to a person other than the claimant, the purchaser of the land shall, in addition to the amount paid for the land, pay to the

secretary of state an amount sufficient to repay to the claimant all sums expended by him in making the entry and advertising same. And the secretary of state shall pay over such sum to the claimant.

Code, s. 2764; 1903, c. 272, s. 2; 1885, c. 185.

1712. Plot attached to grant. The secretary of state shall, on receipt of the plots, file one in his office; the other shall be attached to the grant.

Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10.

1713. Number of survey put in grant. It shall be the duty of the secretary of state, upon issuing a grant, to place in the grant issued the number of the survey from the certificate of survey upon which the grant is founded.

1889, c. 522.

VII. CORRECTING.

1714. County line changed after entry, before grant and registration, grant valid. All grants issued on entries for lands which were entered in one county, and before the issuing of the grants therefor, or the registration of said grants, by the change of former county lines, or the establishment of new lines, the lands so entered were placed in a county, or in counties different from that in which they were situate, and the grants were registered in the county where the entry, or entries were made, shall be good and valid, and the registration of said grants shall have the same force and effect as if they had been registered in the county or counties where the lands were situate; and any and all persons claiming under and by said grants, may have them, or a certified copy of the same, from the office of the secretary of state, or from the office of the register of deeds when they had been erroneously registered, recorded in the office of the register of deeds of the county, or counties where the lands lie, and such registration shall have the same force and effect as if the said grants had been duly registered in said county or counties.

1897, c. 37.

1715. Entries in wrong county, grant valid. Whereas, many citizens of the state, on making entries of lands near the lines of the county wherein they reside, either for want of proper knowledge of the land laws of the state, or not knowing the county lines, have frequently made entries and extended their surveys on such entries into other counties than those wherein they were made, and obtained grants on the same; and whereas, doubts have existed with respect to the validity of the titles to lands situated as aforesaid, so far as they extend into other counties than those where the entries were

made; for remedy whereof, it is hereby declared, that all grants issued on entries made for lands situated as aforesaid, shall be good and valid against any entries hereafter made or grants issued thereon.

Code, s. 2784; R. C., c. 42, s. 27; 1805, c. 675; 1834, c. 17.

1716. How errors in surveys or plots corrected. Whenever there may be an error by the surveyor in plotting or making out the certificate for the secretary's office, or the secretary shall make a mistake in making out the courses agreeable to said returns, or misname the claimant, or make other mistake, so as such claimant shall be injured thereby, the claimant may prefer a petition to the superior court of the county in which the land lies, setting forth the injury which he might sustain in consequence of such error or mistake, with all the matters and things relative thereto; and the said court may hear testimony respecting the truth of the allegations set forth in the petition; and if it shall appear by said testimony, from the return of the surveyor or the error of the secretary, that the patentee is liable to be injured thereby, the court shall direct the clerk to certify the facts to the secretary of state, who shall file the same in his office, and correct the error in the patent, and likewise in the records of his office. The costs of such suit shall be paid by the petitioner, except when any person may have made himself a party to prevent the prayer of the petitioner being granted, in which case the costs shall be paid as the court may decree. The benefits granted by this section to the patentees of land shall be extended in all cases to persons claiming by, from or under their grants, by descent, devise, or purchase. When any error is ordered to be rectified, and the same has been carried through from the grant into mesne conveyances, the court shall direct a copy of the order to be recorded in the register's books of the county: Provided, no such petition shall be brought, but within three years after the date of the patent; and if brought after that time, the court shall dismiss the same, and all proceedings had thereon shall be null and of no effect: Provided further, nothing herein shall affect the rights or interests of any person claiming under a patent issued between the period of the date of the grant alleged to be erroneous, and the time of filing the petition, unless such person shall have had due notice of the filing of the petition, by service of a copy thereof, and an opportunity of defending his rights before the court according to the course of the common law.

Code, s. 2785; R. C., c. 42, s. 28; 1790, c. 326; 1798, c. 504; 1804, c. 655; 1814, c. 876.

1717. Resurvey of lands to correct grants, how obtained. Persons who have heretofore entered or may hereafter enter vacant lands shall not be defeated in their just claims by mistakes or errors in the surveys and plots furnished by surveyors, but in every case where

the purchase money has been paid into the state treasury within the time prescribed by law after entry and the survey or plot furnished shall be found to be defective or erroneous, the party having thus made entry and paid the purchase price may obtain another warrant of survey from the entry-taker of the county where the land lies, and have his entry surveyed as is directed by existing laws, and on presenting a certificate of survey and two fair plots thereof to the secretary of state within six months after said payment of the purchase money, the party making such entry and paying such purchase price shall be entitled to receive, and it shall be the duty of the secretary of state to issue to him the proper grant for the lands so entered.

1901, c. 734.

1718. Seal lost, how replaced. In all cases where the seal annexed to a grant is lost or destroyed, the governor may, on the certificate of the secretary of state that the grant was fairly obtained, cause the seal of the state to be affixed thereto.

Code, s. 2781; R. C., c. 42, s. 24; 1807, c. 727.

1719. Errors in grants, how corrected. If in issuing any grant the number of the grant or the name of the grantee or grantees or any material words or figures suggested by the context has been omitted or not correctly written or given, or the description in the body of the grant does not correspond with the plat and description in the surveyor's certificate attached to the grant, or if in recording the grant in his office the secretary of state has heretofore made or may hereafter make any mistake or omission by which any part of any grant has not been correctly recorded, the secretary of state shall, upon the application of any party interested and the payment to him of his lawful fees, correct the original grant by inserting in the proper place the word or words, figure or figures, name or names omitted or not correctly given or suggested by the context; or if the description in the grant does not correspond with the surveyor's plat or certificate, he shall make the former correspond with the latter as the true facts may require. In case the party interested prefer it, the secretary of state shall issue a duplicate of the original grant, including therein the corrections made; and in those cases in which grants have not been correctly recorded he shall make the proper corrections upon his records, or by re-recording, as he may prefer; and any grant corrected as aforesaid may be recorded in any county of the state as other grants are recorded, and have relation to the time of the entry and date of the grant as in other cases.

1889, c. 460.

1720. In Macon and Jackson; notice given. All corrections or attempted corrections of any grant, heretofore made, or hereafter to

be made, by the secretary of state, under the preceding or any other section of this chapter, shall be null and void, unless all adverse claimants of the land covered by such grant, and all persons affected in any way by such correction or proposed correction shall have been, or shall be, duly notified in writing of the time and place of such application to have said grants corrected, and in what respect the same may be defective or incorrect. If upon the hearing of the proof of both sides by the secretary of state, it does not clearly appear that such correction should be made he shall refuse to make the said change or correction. In all cases the burden of proof that such notice was given shall be upon the party claiming under such corrected grant. This section shall apply only to Jackson and Macon counties.

1901, c. 505.

1721. Irregular entries validated. Wherever persons have prior to January first, one thousand eight hundred and eighty-three, irregularly entered lands and have paid the fees required by law to the secretary of state, and have obtained grants for such lands duly executed, then and in that case the title to the said lands shall not be affected by reason of such irregular entries; and the said grants are hereby declared to be as good and valid, as if such entries had been properly made.

Code, s. 2761; 1868-9, c. 100, s. 4; 1868-9, c. 173, s. 6; 1874-5, c. 48.

1722. Grants issued prior to 1820, validated. All grants issued by the secretary of state, previous to the year one thousand eight hundred and twenty, on surveys made fairly and without fraud, and signed by the deputy surveyor only, shall be good and effectual to pass all the right of the state in and to said land, in as full and ample a manner as if such returns had been made in due form: Provided, nothing herein shall affect any entries made, or grants obtained on legal returns for such lands, previous to the year one thousand eight hundred and twenty-nine.

Code, s. 2783; R. C., c. 42, s. 26; 1828, c. 46.

1723. Grants to surveyors prior to 1829, confirmed. Grants of land made by the state to surveyors and deputy surveyors, prior to the first day of January, one thousand eight hundred and twenty-nine, upon surveys, plots, and certificates of the same, made by them for themselves respectively, without other illegality, and without fraud or partiality, the certificates in all cases being signed by the principal surveyor, are confirmed and declared to be good and valid.

Code, s. 2782; R. C., c. 42, s. 25; 1828, c. 23, s. 2.

1724. Time for registering grants extended. All grants from the state of North Carolina of lands and interests in land heretofore

made, which were required or allowed to be registered within a time or times specified by law, or in the grants themselves, may be registered in the counties in which the lands lie respectively at any time or times within six years from the first day of January, nineteen hundred and one, notwithstanding the fact that such specified times have already expired, and all such grants heretofore registered after the expiration of such specified time or times shall be taken and treated as if they had been registered within such specified time or times: Provided, that nothing herein contained shall be held or have the effect to divest any rights, titles or equities in or to the land covered by such grants, or any of them, acquired by any person or persons from the state of North Carolina by or through any entry or entries, grant or grants, made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or entries, grant or grants.

1893, c. 40; 1901, c. 175.

VIII. GRANTS VACATED.

1725. Suits to vacate grants, when and where brought. When any person claiming title to lands under a grant or patent from the king of Great Britain, any of the lords proprietors of North Carolina, or from the state of North Carolina, shall consider himself aggrieved by any grant or patent issued or made since the fourth day of July, one thousand seven hundred and seventy-six, to any other person, against law or obtained by false suggestions, surprise or fraud, the person aggrieved may bring a civil action in the superior court for the county in which such land may be, together with an authenticated copy of said grant or patent, briefly stating the grounds whereon such patent should be repealed and vacated, whereupon the grantee, patentee, or the person, owner or claimant under such grant or patent shall be required to show cause why the same shall not be repealed and vacated.

Code, s. 2786; R. C., c. 42, s. 29.

1726. Judgment vacating grant, recorded in secretary of state's office. If, upon verdict or demurrer the court believe that the patent or grant was made against law or obtained by fraud, surprise, or upon untrue suggestions, they may vacate the same; and a copy of such judgment, after being recorded at large, shall be filed by the petitioner in the secretary's office, where it shall be recorded in a book kept for that purpose; and the secretary shall note in the margin of the original record of the grant the entry of the judgment, with a reference to the record in his office.

Code, s. 2787; R. C., c. 42, s. 39.

1727. When state will bring suit to vacate grants. An action may be brought by the attorney general, in the name of the state, for the purpose of vacating or annulling letters patent granted by the state, in the following cases:

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or

2. When he shall have reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or

3. When he shall have reason to believe that the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

Code, s. 2788; C. C. P., s. 367.

IX. PHOSPHATE BEDS.

1728. Phosphate rock under navigable waters, when entered. Any resident of this state who shall make affidavit before the clerk of the superior court of any county through which such navigable stream may flow, that he has discovered in any navigable stream or waters of this state any phosphate rock or phosphate deposit therein shall have authority and power to enter under the entry laws of this state so much of the bed of any such navigable stream or waters as shall not exceed in any one entry two miles in length up the middle of any such stream or water for the purpose of digging, mining or removing any such deposit or rock.

1891, c. 476.

1729. How grant obtained; term; royalty. Upon such affidavit being filed with the entry-taker, and upon a survey and plot being made of such entry by the county surveyor, as is now required by law in cases of entry of land, being made and certified to the secretary of state with a copy of such affidavit and entry so made, the said secretary of state shall issue a patent or grant to the said person, his heirs or assigns, for a term of twenty-five years for such land, with the proviso and condition inserted therein that the grantee therein shall pay to the treasurer of the state at the end of every three months a royalty of one dollar per ton for each and every ton of the crude phosphate rock or deposit mined, dug or removed.

1891, c. 476, s. 2.

1730. Exclusive right to mine; bond for royalty. Such grantee, his heirs or assigns, shall have the exclusive right to mine, dig

or remove any such phosphate rock or deposit for the term of twenty-five years from the date of said patent upon paying the said royalty of one dollar specified in said patent: Provided, however, that as a condition precedent to the granting of any such patent each such company or person making any such entry shall enter into bond with sufficient security in the penal sum of five thousand dollars, conditioned for the making of faithful and true returns to the treasurer of the state of the number of tons of phosphate rock and phosphate deposit so dug, mined or removed, at the end of every month, and the punctual payment to the said treasurer of the royalty of one dollar per ton upon each and every ton of the crude rock, without being steamed or dried, at the end of every three months, and the said bond and sureties shall be subject to the approval now required by law for the bonds of state officers.

1891, c. 476, s. 3.

1731. Navigation not obstructed by grantee. No grant issued under the provisions of this subchapter shall confer upon the person receiving the same the right to obstruct the navigation of any such stream or water, nor confer upon any such person or his assigns any other right than that granted to take, mine or dig phosphate rock or deposit therefrom.

1891, c. 476, s. 4.

1732. Fees for issuing grant for phosphate beds. No fee or cost shall be charged or collected by the secretary of state of any person or corporation receiving any patent or grant under this subchapter, except the fee allowed by law to the said secretary of state for issuing a patent under the entry laws of the state.

1891, c. 476, s. 5.

1733. Failure to operate for two years vacates grant. Any person, company or corporation who shall fail to dig, mine or remove phosphate rock or deposit from any such stream or water to which he or it may be entitled under any patent or grant issued under the provisions of this subchapter for the period of two years from the date of said patent, or after beginning digging, mining or removing the same, shall fail to continue to so dig, mine or remove the same for the period of two years, shall forfeit any and all rights therein granted, and said territory shall immediately thereupon become subject to entry under the provisions of this subchapter without making the affidavit of the discovery of any such deposits or rocks.

1891, c. 476, s. 6.

1734. May be mined without grant, how. Any person or corporation resident of this state shall have the right to mine, dig or

remove phosphate rock or deposits from any of the navigable streams or waters in this state to which no exclusive patent or grant may have been issued, upon such person or corporation first entering into bond in the penal sum of five thousand dollars, payable to the treasurer of the state, for the payment of the same royalty, in the same manner and under the same regulations as are prescribed in section seventeen hundred and thirty; but nothing in this section shall be construed to give to any such person or corporation any exclusive franchise or privilege to dig, mine or remove any such phosphate rock or deposit from any stream or water of this state.

1891, c. 476, s. 7.

CHAPTER 38.

GUARDIAN.

| | Sections. |
|---|-----------|
| I. Public guardians, | 1735—1738 |
| II. Appointed by parent, | 1739—1742 |
| III. Jurisdiction, clerk superior court, | 1743—1753 |
| IV. Bonds, | 1754—1762 |
| V. Powers and duties, | 1763—1774 |
| VI. Estates sold, | 1775—1778 |
| VII. Returns and accounting, | 1779—1786 |
| VIII. Estate protected, when no guardian, | 1787—1794 |
| IX. Foreign guardians, | 1795—1797 |

I. PUBLIC GUARDIANS.

1735. How appointed; tenure. There may be in every county a public guardian to be appointed by the clerk of the superior court for a term of eight years.

Code, s. 1556; 1874-5, c. 221.

1736. Oath of office. The public guardian shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties imposed upon him; the oath so taken and subscribed shall be filed in the office of the clerk of the superior court.

Code, s. 1560; 1874-5, c. 221, s. 5.

1737. When letters issued to. The public guardian shall apply for and obtain letters of guardianship in the following cases:

1. When a period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without guardian.

2. When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian: Provided, it shall be lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation.

Code, s. 1561; 1874-5, c. 221, ss. 6, 7.

1738. Powers, duties, liabilities, compensation. The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws; and shall receive the same compensation as other guardians.

Code, s. 1561; 1874-5, c. 221, ss. 6, 7.

II. APPOINTED BY PARENT.

1739. Father, and if dead, mother may appoint. Any father, though he be a minor, may, by deed executed in his lifetime or by his last will and testament in writing, dispose of the custody and tuition of any of his infant children, being unmarried and whether born at his death or in ventre sa mere, for such time as the children may remain under twenty-one years of age, or for any less time. Or in case such father shall be dead and shall not have exercised his said right of appointment, then the mother, whether of full age or a minor, may do so.

Code, s. 1562; R. C., c. 54; 1762, c. 69; 1868-9, c. 201; 1881, c. 64.

1740. Effect of such appointment. Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children.

Code, s. 1563; R. C., c. 54; 1762, c. 69, s. 2; 1868-9, c. 201, s. 2.

1741. Powers and liabilities of other guardians. Every guardian by deed or will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians.

Code, s. 1564; R. C., c. 54; 1762, c. 69; 1868-9, c. 201, s. 3.

1742. Mother natural guardian, father dead. In case of the death of the father of an infant, the mother of such child surviving such father shall immediately become the natural guardian of such child to the same extent and in the same manner, plight and condition as the father would be if living; and the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian. But this shall not

be construed as abridging the powers of the courts over minors and their estates and to the appointment of guardians.

Code, s. 1565; 1883, c. 364.

III. JURISDICTION OF CLERK OF SUPERIOR COURT OVER.

1743. May appoint, for infants, idiots, lunatics and inebriates.

The clerks of the superior court within their respective counties shall have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics and inebriates, except where otherwise prescribed by law.

Code, s. 1566; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 7; 1868-9, c. 201, s. 4.

Note. When wages of apprentice exceed \$100, see Apprentices, s. 187.

1744. May commit custody to one, estate to another. Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever and at any time during minority, inebriety, idiocy or lunacy, it appears most conducive to the proper care of the orphan's, inebriate's, idiot's or lunatic's estate, and to his suitable maintenance, nurture and education.

Code, s. 1567; R. C., c. 54, s. 3; 1840, c. 31.

1745. May allow yearly sum for support and education. In such cases the clerk must order what yearly sums of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require.

Code, s. 1568; R. C., c. 54, s. 3; 1840, c. 31; 1868-9, c. 201, s. 6.

1746. What disbursements and commissions allowed. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only.

Code, s. 1569; R. C., c. 54, s. 3; 1840, c. 31, s. 3; 1868-9, c. 201, s. 7.

Note. See s. 1785.

1747. Appointed by, in case of divorce. When parents are divorced and a child is entitled to any estate, the court granting the

divorce must certify that fact to the clerk of the superior court, to the end that he may appoint a fit and proper person to take the care and management of such estate, whose powers and duties shall be the same in all respects as other guardians, except that a guardian so appointed shall not have any authority over the person of such child, unless the guardian be the father or mother.

Code, s. 1571; R. C., c. 54, s. 4; 1838, c. 16; 1868-9, c. 201, s. 9.

1748. May appoint when father is alive. The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor be living. And the guardian so appointed shall be governed in all respects by the laws relative to guardians of the estate in other cases, but shall have no authority over the person of such minor.

Code, s. 1572; R. C., c. 54, ss. 4, 7; 1806, c. 707; 1868-9, c. 201, s. 10.

1749. Proceedings on application for. On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, inebriate or lunatic, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant or of any other person; and if none of the relatives of the infant, idiot, inebriate or lunatic are present at such application, the clerk must assign, or, for any other good cause, he may assign a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate or lunatic, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant, idiot, inebriate, or lunatic.

Code, s. 1620; C. C. P., s. 474.

1750. Must issue letters. The clerk of the superior court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office.

Code, s. 1621; C. C. P., s. 475.

1751. Removed, when. The clerks of the superior court shall have power, on information or complaint made, at all times to remove guardians and appoint successors, to make and establish rules for the better ordering, managing and securing infants' estates, and for the better education and maintenance of wards; and it shall be their duty to do so in the following cases:

1. Where the guardian wastes or converts the money or estate of the ward to his own use.

2. Where the guardian in any manner mismanages the estate.

3. Where the guardian is about or intends to marry any ward in disparagement.

4. Where the guardian neglects to educate or maintain the ward in a manner suitable to his or her degree.

5. Where the guardian is legally disqualified to act as a person would be to be appointed administrator.

6. Where the guardian or his sureties are likely to become insolvent or nonresidents of the state.

Code, s. 1583; R. C., c. 54, ss. 2, 13; 1762, c. 69; 1868-9, c. 201, s. 20; C. C. P., ss. 470, 476.

1752. Interlocutory orders pending controversy. In all cases where the letters of a guardian are revoked, the clerk of the superior court may, from time to time, pending any controversy in respect to such removal, make such interlocutory orders and decrees as will tend to the better securing the estate of the ward, or other party seeking relief by such revocation.

Code, s. 1607; 1868-9, c. 201, s. 44.

1753. Resignation of; must first account. Any guardian wishing to resign his trust may apply in writing to the superior court, setting forth the circumstances of his case. If, at the time of making the application, he also exhibits his final account for settlement, and if the clerk of the superior court is satisfied that the guardian has been faithful and has truly accounted, and if a competent person can be procured to succeed in the guardianship, the clerk of the superior court may accept the resignation of the guardian and discharge him from the trust. But the guardian so discharged and his sureties are still liable in relation to all matters connected with the trust before the resignation.

Code, s. 1608; 1868-9, c. 201, s. 45.

IV. BONDS.

1754. Not to receive property till approved. No guardian appointed for an infant, idiot, lunatic, insane person, or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court.

Code, s. 1573; C. C. P., s. 355.

1755. Given before letters issued; increased if property sold. Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or

more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. The penalty in such bond must be double, at least, the value of all personal property, and the rents and profits issuing from the real estate of the infant; which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or of any other person. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge, touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold.

Code, s. 1574; R. C., c. 54, s. 5; 1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; 1868-9, c. 201, s. 11; 1874-5, c. 214.

1756. Recorded in clerk's office; injured person may sue on.

The bond so taken shall be recorded in the office of the clerk of the superior court appointing the guardian; and any person injured by a breach of the condition thereof, may prosecute a suit thereon, as in other actions.

Code, s. 1575; R. C., c. 54, s. 5; 1868-9, c. 201, s. 12.

1757. One bond where wards have common property. When the same person is appointed guardian to two or more minors, idiots, lunatics or insane persons possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action.

Code, s. 1576; R. C., c. 54, s. 8; 1822, c. 1161; 1868-9, c. 201, s. 13.

1758. Renewed every three years. Every guardian shall renew his bond before the clerk of the superior court every three years, during the continuance of the guardianship.

Code, s. 1581; R. C., c. 54, s. 10; 1868, c. 201, s. 18.

1759. Duty of clerk on failing to renew. The clerk of the superior court shall issue a citation against every guardian failing to renew his bond, as directed in the preceding section, requiring such guardian to renew his bond within twenty days after service of the citation; and on return of the citation duly served and failure of the guardian to comply therewith, the clerk shall remove him and appoint a successor.

Code, s. 1582; R. C., c. 54, s. 10; 1762, c. 69, s. 15; 1868-9, c. 201, s. 19.

1760. Sureties relieved. Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file his complaint before the clerk of the superior court where the guardianship was granted, setting forth the circumstances of his case and demanding relief; and thereupon the guardian shall be required to answer the complaint within twenty days after service of the summons. If, upon the hearing, the clerk of the superior court deem the surety entitled to relief, the same may be granted by compelling the guardian to give a new bond, or to indemnify the surety against apprehended loss, or by the removal of the guardian from his trust; and in case the guardian fail to give a new bond or security to indemnify when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease.

Code, s. 1606; R. C., c. 54, s. 35; 1762, c. 69, ss. 21, 22; 1868-9, c. 201, s. 43.

1761. Liability of clerk for taking insufficient. If any clerk of the superior court shall commit the estate of an infant, idiot, lunatic, insane person or inebriate to the charge or guardianship of any person without taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the superior court shall not be liable.

Code, s. 1614; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 6; 1868-9, c. 201, s. 51.

1762. Liability of clerk for other defaults. If any clerk of the superior court shall wilfully or negligently do, or omit to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, he shall be liable therefor as in the preceding section directed.

Code, s. 1615; 1868-9, c. 201, s. 52.

V. POWERS AND DUTIES.

1763. Must take charge of estate. Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor.

Code, s. 1588; R. C., c. 54, s. 21; 1762, c. 69, s. 3; 1868-9, c. 201, s. 25.

1764. Must sell perishable goods on order of clerk. Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. Every such order shall be entered in the

order record of the superior court and must contain a descriptive list of the property to be sold, with the terms of sale.

Code, s. 1589; R. C., c. 54, s. 22; 1762, c. 69, s. 10; 1868-9, c. 201, s. 26.

1765. Sales and rentings, how made. All sales and rentings by guardians shall be publicly made, between the hours of ten o'clock a. m. and four o'clock p. m., after twenty days' notice posted at the courthouse and four other public places in the county. But, upon petition by the guardian, the clerk of the superior court of the county in which the land of the ward is situated, or of the county wherein the guardian has qualified, may make an order, on satisfactory evidence, upon the oath of at least two disinterested freeholders acquainted with the said land, that the best interests of the said ward will be subserved by a private renting of said land, allowing the guardian to rent the land privately. The terms of all such rentings shall be reported to said clerk of the superior court and be approved by him. In cases where guardians have heretofore rented their ward's land at private rentings in good faith and for the benefit of the ward's estate, they shall not be liable to the penalty heretofore prescribed by law. The proceeds of all sales of personal estate and rentings of real property, except the rentings of lands leased for agricultural purposes, when not for cash, shall be secured by bond and good security.

Code, s. 1590; 1891, c. 83; 1901, c. 97; R. C., c. 54, s. 26; 1793, c. 391.

1766. May lease lands, when. The guardian may lease the lands of an infant for a term not exceeding the end of the current year in which the infant shall come of age, or die in nonage. But no guardian without leave of the clerk of the superior court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land.

Code, s. 1591; R. C., c. 54, s. 25; 1762, c. 69, s. 13; 1794, c. 413, s. 2.

1767. When timber may be sold. In case the land can not be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk of the superior court, may annually dispose of, or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon and no more.

Code, s. 1596; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 33.

1768. Plate and jewelry to be kept. All plate and jewelry shall be preserved and delivered to the ward at age, in kind, according to weight and quantity.

Code, s. 1597; 1895, c. 74; 1868-9, c. 201, s. 34.

1769. Funds invested by fiduciaries. Guardians, trustees, and others acting in a fiduciary capacity, having surplus funds of their wards and cestuis que trustent to loan, may invest in United States bonds, or any securities for which the United States are responsible, or in consolidated bonds of the state of North Carolina, and in settlements by guardians, trustees and others acting in a fiduciary capacity, such bonds or other security of the United States, and such bonds of the state of North Carolina, shall be deemed cash to the amount actually paid for same, including the premium, if any paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled.

Code, s. 1594; 1870-1, c. 197; 1885, c. 389.

Note. For interest guardian notes bear, see s. 1933.

1770. Deposit of trust funds, at fiduciaries' risk. No provision in any charter or certificate of organization of any corporation permitting deposits therein by any guardian, executor or other trustee or fiduciary, or by any county, bonded or other officer, shall operate or be construed to relieve or discharge them, or either of them, from official responsibility, or to relieve them, or either of them, or their sureties, from liability on their official bonds.

1889, c. 470.

1771. Executor of deceased, pays money to clerk. In all cases where a guardian of any minor child or of an idiot, lunatic, inebriate or insane person shall die, it shall be competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to any such minor child, idiot, lunatic, insane person or inebriate, and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid.

Code, s. 1622; 1881, c. 301, s. 2.

1772. When liable for debts. Every guardian shall diligently endeavor to collect, by all lawful means, all bonds, notes, obligations or moneys due his ward when any debtor or his sureties are likely to become insolvent, on pain of being liable for the same.

Code, s. 1593; R. C., c. 54, s. 23; 1762, c. 69, s. 10; 1868-9, c. 201, s. 30.

1773. Liable for land sold for taxes. If any guardian suffer his ward's lands to lapse or become forfeited or be sold for nonpayment of taxes or other dues, he shall be liable to answer for the full value thereof to his ward.

Code, s. 1595; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 32.

1774. Liable for costs, when. All fees and costs of the superior court for issuing orders, citations, summonses or other process against guardians for their supposed defaults, shall be paid by the party found in default.

Code, s. 1611; 1868-9, c. 201, s. 48.

NOTE. For duty of guardian to pay owelty, see s. 2496.

VI. ESTATES SOLD.

1775. By special proceeding; approved by judge. On application of the guardian by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; but no sale shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of title made, unless confirmed and directed by the judge, and the proceeds of the sale shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify.

Code, s. 1602; R. C., c. 54, ss. 32, 33; 1827, c. 33; 1868-9, c. 201, s. 39.

1776. Property and fund held on same trusts. Whenever, in consequence of any sale under the preceding section, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all such cases of sale, whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been, had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner, and restored to its character proper.

Code, s. 1603; R. C., c. 54, s. 33; 1827, c. 33, s. 2; 1868-9, c. 201, s. 40.

1777. Sold to pay ward's debts. When a guardian has notice of a debt or demand against the estate of his ward, he may apply by petition, setting forth the facts to the clerk of the superior court wherein the guardianship was granted, for an order to sell so much of the personal or real estate as may be sufficient to discharge such

debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of sale; but no real estate shall be sold under this section, in any case, without the revision and confirmation of the order therefor by the judge of the superior court.

Code, s. 1604; R. C., c. 54, s. 34; 1789, c. 311, s. 5; 1868-9, c. 201, s. 41.

1778. Proceeds assets for creditors; reached as against executors. The proceeds of sale under the preceding section shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

Code, s. 1605; R. C., c. 54, s. 34; 1789, c. 311, s. 5; 1868-9, c. 201, s. 42.

NOTE. For conveyances by infant trustees, see s. 983.

VII. RETURNS AND ACCOUNTING.

1779. First, within three months. Every guardian, within three months after his appointment, shall exhibit an account, upon oath, of the estate of his ward, to the clerk of the superior court; but such time may be extended by the clerk of the superior court, on good cause shown, not exceeding six months.

Code, s. 1577; R. C., c. 54, s. 11; 1762, c. 69, s. 9; 1868-9, c. 201, s. 14.

1780. Compelled by attachment. In cases of default to exhibit the return required by the preceding section, the clerk of the superior court must issue an order requiring the guardian to file such return forthwith, or to show cause why an attachment should not issue against him. If, after due service of the order, the guardian does not, on the return day of the order, file such return, or obtain further time to file the same, the clerk of the superior court shall issue an attachment against him, and commit him to the common jail of the county, till he files such return.

Code, s. 1578; R. C., c. 54, s. 12; 1762, c. 69, s. 15; 1868-9, c. 201, s. 15.

1781. To be made of new assets. Whenever further property of any kind, not included in any previous return, comes to the hands or knowledge of any guardian, he must cause the same to be returned within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as prescribed in the preceding section.

Code, s. 1579; 1868-9, c. 201, s. 16.

1782. Annual accounts. Every guardian shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account,

under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed *prima facie* evidence of correctness.

Code, s. 1617; R. C., c. 54, ss. 11, 12; 1762, c. 69, ss. 9, 15; 1871-2, c. 46.

1783. Compelled by attachment and removal. If any guardian omit to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk of the superior court shall forthwith order such guardian to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such guardian fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against him for contempt and commit him till he exhibits such account, and may likewise remove him from office.

Code, s. 1618; C. C. P., s. 479.

1784. Final account. A guardian may be required to file such account at any time after six months from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the superior court.

Code, s. 1619; C. C. P., s. 481.

1785. Allowed reasonable disbursements and expenses. Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he hath really and bona fide disbursed more in one year than the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward.

Code, s. 1612; R. C., c. 54, s. 28; 1762, c. 69, ss. 18, 19; 1799, c. 536, s. 2; 1868-9, c. 201, s. 49.

Note. See s. 1746.

1786. Commissions. The superior court shall allow commissions to the guardian for his time and trouble in the management of the

ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors.

Code, s. 1613; R. C., c. 54, s. 28; 1762, c. 69, ss. 18, 19; 1868-9, c. 201, s. 50.

NOTE. For liability in permitting land sold for taxes, see s. 2869.

VIII. ESTATE PROTECTED WHEN NO GUARDIAN.

1787. Duty of grand jury relating to orphans; clerk to furnish it list of guardians. The grand jury of every county is charged with, and shall present to the superior court the names of all orphan children that have no guardian or are not bound out to some trade or employment. They shall further inquire of all abuses, mismanagement and neglect of all such guardians as are appointed by the clerk of the superior court. The clerk of the superior court shall, at each term of the superior court, lay before the grand jury a list of all the guardians acting in his county or appointed by him.

Code, s. 1609; R. C., c. 54, s. 18; 1762, c. 69, s. 17; 1868-9, c. 201, s. 46.

1788. Solicitor to apply for receiver, when. Whenever an orphan, having any estate, is presented by a grand jury, for whom no suitable person will become guardian, the clerk of the superior court must give notice thereof forthwith to the solicitor of the state for the judicial district, who shall apply in behalf of the orphan to the judge of the superior court of the county where such presentment was made, to the end that a receiver be appointed.

Code, s. 1610; R. C., c. 54, s. 19; 1846, c. 43; 1868-9, c. 201, s. 47.

1789. Action brought by solicitor. Whenever any guardian is removed, and no person is appointed to succeed in the guardianship, the clerk of the superior court shall certify the name of such guardian and his sureties to the solicitor of the judicial district, who shall forthwith institute an action on the bond of the guardian in the superior court, for securing the estate of the ward.

Code, s. 1584; R. C., c. 54, s. 14; 1844, c. 41; 1868-9, c. 201, s. 21.

1790. Receiver appointed. The judge of the superior court, either residing in or presiding over the courts of the district, before whom such action is brought, shall have power to appoint the clerk of the superior court or some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due to him, to secure, lend, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to such rules and orders in every respect as the said judge may from time to time make in regard thereto; and the accounts of such receiver shall be returned, audited and settled as the judge may direct. The receiver shall be allowed such amounts for his time, trouble and responsibility as

seem to the judge reasonable and proper; and such receivership may be continued until a suitable person can be procured to take the guardianship.

Code, s. 1585; R. C., c. 54, s. 15; 1844, c. 41, s. 2; 1868-9, c. 201, s. 22.

1791. Property obtained from receiver. When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the ward, on coming of age, or in case of his death, his executor, administrator or collector, and the heir or personal representative of the idiot, lunatic or insane person, shall have the like remedy against the receiver.

Code, s. 1587; R. C., c. 54, s. 17; 1844, c. 41, s. 4; 1868-9, c. 201, s. 24.

1792. Solicitor shall prosecute action. The solicitor shall prosecute the action and take all necessary orders therein, and for his services shall be allowed such reasonable compensation as may be just, not to exceed ten dollars; in passing on the returns of receivers, where the estate of the infant does not exceed five hundred dollars, not to exceed five dollars; and where the estate exceeds five hundred dollars, not to exceed ten dollars. The amount in each case to be fixed by the judge.

Code, s. 1586; 1895, c. 14; R. C., c. 54, s. 16; 1844, c. 41, s. 3; 1868-9, c. 201, s. 23.

NOTE. For law directing use of estates less than twenty dollars in value, see Clerk Superior Court.

IX. FOREIGN GUARDIANS.

1793-5. May have ward's estate removed. Where any ward idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, is entitled to any personal estate in this state, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this state, or of any executor, administrator or other person holding for the ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian of the ward, idiot, lunatic or insane person, duly appointed at the place where such ward, idiot, lunatic or insane person resides, may apply to have such estate removed to the residence of the ward, idiot, lunatic or insane person by petition filed before the clerk of the superior court of the county in which the

property or some portion thereof is situated; which shall be proceeded with as in other cases of special proceedings.

Code, ss. 1598, 1601; R. C., c. 54, s. 29; 1820, c. 1044; 1842, c. 38; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168.

1796. What petition must show. The petitioner must show to the court a copy of his appointment as guardian and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the ward wherever situated.

Code, s. 1599; R. C., c. 54, s. 30; 1820, c. 1044, s. 2; 1842, c. 38; 1868-9, c. 201, s. 36.

1797. Who may be made defendants. Any person may be made a party defendant to the proceeding who is specified in section three hundred and seventy.

Code, s. 1600; R. C., c. 54, s. 30; 1868-9, c. 201, s. 37.

NOTE. For rate of interest guardian notes to bear, see Interest, s. 1933.

For guardians of idiots, inebriates and lunatics, see Idiots, etc., ss. 1870-1875.

For cross-index of appointments of guardians, see Clerk Superior Court, s. 868.

For payment of owelty of partition due by ward, see s. 2496.

CHAPTER 39.

HABEAS CORPUS.

| | Sections. |
|-------------------------------|-----------|
| I. Generally, | 1798—1799 |
| II. The application, | 1800—1805 |
| III. The writ, | 1806—1808 |
| IV. The return, | 1809—1812 |
| V. Obedience compelled, | 1813—1821 |
| VI. Proceedings and judgment, | 1822—1831 |
| VII. Custody of children, | 1832—1833 |
| VIII. Ad testificandum, | 1834—1840 |

I. GENERALLY.

1798. Cause of restraint of liberty enquired into. Every person restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed.

Const., Art. I., s. 18.

1799. Habeas corpus shall not be suspended. The privileges of the writ of habeas corpus shall not be suspended.

Const., Art. I., s. 21.

II. THE APPLICATION.

1800. Who may prosecute writ. Every person imprisoned or restrained of his liberty within this state, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in the succeeding section, may prosecute a writ of habeas corpus, according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.

Code, s. 1623; 1868-9, c. 116, s. 1.

1801. When denied. Application to prosecute the writ shall be denied in the following cases:

1. Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or shall have acquired exclusive jurisdiction by the commencement of suits in such courts.

2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

3. Where any person has wilfully neglected, for the space of two whole terms after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

4. Where no probable ground for relief is shown in the application.

Note. See s. 1827.

Code, s. 1624; 1868-9, c. 116, s. 2.

1802. By whom made. Application for the writ may be made either by the party for whose relief it is intended, or by any person in his behalf.

Code, s. 1625; 1868-9, c. 116, s. 3.

1803. How and to whom. Application for the writ shall be made in writing, signed by the applicant—

1. To any one of the justices of the supreme court.

2. To any one of the superior court judges, either at term time or in vacation.

Code, s. 1626; 1868-9, c. 116, s. 4.

1804. What it must state. The application must state in substance, as follows:

1. That the party, in whose behalf the writ is applied for, is

imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

2. The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

3. If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

4. If the imprisonment or restraint be alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

5. The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits.

Code, s. 1627; 1868-9, c. 116, s. 5.

1805. When issued without. Whenever the supreme or superior court, or any judge of either, shall have evidence from any judicial proceeding before such court or judge, that any person within this state is illegally imprisoned or restrained of his liberty, it shall be the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ.

Code, s. 1632; 1868-9, c. 116, s. 10.

III. THE WRIT.

1806. When granted. Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this chapter, prohibited from prosecuting the writ.

Code, s. 1628; 1868-9, c. 116, s. 6.

1807. Penalty for refusal to grant. If any judge authorized by this chapter to grant writs of habeas corpus shall refuse to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars.

Code, s. 1631; 1868-9, c. 116, s. 9.

1808. When sufficient. No writ of habeas corpus shall be disobeyed on account of any defect of form. It shall be sufficient—

1. If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or if both such names be unknown or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person.

2. If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended.

Code, ss. 1629, 1630; 1868-9, c. 116, ss. 7, 8.

IV. THE RETURN.

1809. When returnable. Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein.

Code, s. 1656; 1868-9, c. 116, s. 31.

1810. What to contain; when verified. The person or officer on whom the writ is served must make a return thereto in writing, and, except where such person shall be a sworn public officer and shall make his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally—

1. Whether he have or have not the party in his custody or under his power or restraint.

2. If he have the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.

3. If the party be detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.

4. If the person or officer upon whom such writ is served, shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place.

Code, s. 1633; 1868-9, c. 116, s. 11.

1811. Body produced, when. If the writ require it, the officer or person on whom the same has been served shall also produce the

body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided.

Code, s. 1636; 1868-9, c. 116, s. 14.

1812. Served, how and by whom. The writ of habeas corpus may be served by any qualified elector of this state, thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person can not be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling-house of the party to whom the writ is directed, or of the place where the party is confined for whose relief it is sued out.

Code, s. 1657; 1868-9, c. 116, s. 32.

V. OBEDIENCE COMPELLED.

1813. Attachment for failure to obey. If the person or officer on whom any writ of habeas corpus shall have been duly served shall refuse or neglect to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse be shown for such refusal or neglect, it shall be the duty of the court or judge before whom the writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this state, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge, and on being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ shall have been issued.

Code, s. 1637; 1868-9, c. 116, s. 15.

1814. Penalty, judge refusing attachment. If any judge shall wilfully refuse to grant the writ of attachment, as provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Code, s. 1638; 1870-1, c. 221, s. 2.

1815. Sheriff attached, writ to coroner; penalty. If a sheriff shall have neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own.

Code, s. 1639; 1868-9, c. 116, s. 16.

1816. Precept to bring up party detained. The court or judge, by whom any such attachment may be issued, may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith, before such court or judge, the party, wherever to be found, for whose benefit the writ of habeas corpus has been granted.

Code, s. 1640; 1868-9, c. 116, s. 17.

1817. Penalty, judge refusing to grant precept. If any judge shall refuse to grant the precept provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Code, s. 1641; 1870-1, c. 221, s. 3.

1818. Penalty, judge conniving at insufficient return. If any judge shall grant the attachment, or the precept, and shall give the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Code, s. 1642; 1870-1, c. 221, s. 4.

1819. Power of county to aid service. In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases.

Code, s. 1643; 1868-9, c. 116, s. 18.

1820. Obedience to order of discharge, compelled. Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five

hundred dollars, besides any special damages which such party may have sustained.

Code, s. 1649; 1868-9, c. 116, s. 24.

1821. Not liable civilly for obedience. No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus.

Code, s. 1650; 1868-9, c. 116, s. 25.

VI. PROCEEDINGS AND JUDGMENT.

1822. Notice to interested parties. When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it shall appear that the person so interested, or his attorney, if he have one, shall have had reasonable notice of the time and place at which such writ is returnable.

Code, s. 1634; 1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1.

1823. Notice to solicitor. When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ shall have been returned, or shall be made returnable, be given to the solicitor of the county in which the person prosecuting the writ is detained.

Code, s. 1635; 1868-9, c. 116, s. 13.

1824. Witnesses subpœnaed. Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpœna, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases.

Code, s. 1659; 1868-9, c. 116, s. 34.

1825. Facts examined into; proofs heard summarily. The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to

hear the allegations and proofs on both sides, and to do what to justice shall appertain in delivering, bailing or remanding such party.

Code, s. 1644; 1868-9, c. 116, s. 19.

1826. Party discharged, when. If no legal cause be shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appear on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.

2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.

3. Where the process is defective in some matter of substance required by law, rendering such process void.

4. Where the process, though in proper form, has been issued in a case not allowed by law.

5. Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.

6. Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.

Code, s. 1645; 1868-9, c. 116, s. 20.

1827. Party remanded, when. It shall be the duty of the court or judge forthwith to remand the party, if it appear that he is detained in custody, either—

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.

2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

3. For any contempt specially and plainly charged in the commitment by some court, officer or body, having authority to commit for the contempt so charged.

4. That the time during which such party may be legally detained has not expired.

Code, s. 1646; 1868-9, c. 116, s. 21.

Note. See s. 1801.

1828. Party bailed or remanded, when. If it appear that the party has been legally committed for any criminal offense, or if it

appear by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offense, although the commitment be irregular, the court or judge shall proceed to let such party to bail, if the case be bailable and good bail be offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken, if the person or officer, under whose custody or restraint he was, be legally entitled thereto; if not so entitled, the court or judge shall commit such party to the custody of the officer or person legally entitled thereto.

Code, s. 1647; 1868-9, c. 116, s. 22.

1829. Party in execution not to be discharged on habeas corpus. When a writ of habeas corpus cum causa shall issue, and the sheriff or other officer to whom it is directed shall return upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail, but shall be presently remanded, where he shall remain until discharged in due course of law.

Code, s. 937; R. C., c. 31, s. 111; 2 Hen. V., c. 2.

1830. Determined in absence of party, when. Whenever, from the illness or infirmity of the person directed to be produced by a writ of habeas corpus, such person can not, without danger, be brought before the court or judge, where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge be satisfied of the truth of the allegation and the return be otherwise sufficient the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced.

Code, s. 1648; 1868-9, c. 116, s. 23.

1831. Penalty for committing for same cause. No person who has been set at large upon any writ of habeas corpus shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars to the party aggrieved thereby.

Code, s. 1651; 1868-9, c. 116, s. 26.

Note. See also, Crimes.

NOTE. For penalty on officer for refusing to execute writ, or show commitment, see Crimes.

VII. CUSTODY OF CHILDREN.

1832. Awarded by judge; modification of order. When a contest shall arise on a writ of habeas corpus between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same.

Code, s. 1661; 1858-9, c. 53; 1868-9, c. 116, s. 36.

Note. For consequence of divorce on right to custody of children, see s. 1518.

1833. Appeal to supreme court. In all cases of habeas corpus, where a contest shall arise in respect to the custody of minor children, either party may appeal to the supreme court from the final judgment.

Code, s. 1662; 1858-9, c. 53, s. 2.

VIII. AD TESTIFICANDUM.

1834. Courts of record may issue. Every court of record may, in its discretion, have power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the state, for any cause, except such prisoner be under sentence for a capital felony, to be examined as a witness in such suit or proceeding, in behalf of the party making the application.

Code, s. 1663; 1868-9, c. 116, s. 37.

1835. Issued by justices and clerks, when. Such writ of habeas corpus may be issued by any justice of the peace or clerk of the superior court upon application as provided in the preceding section, to bring any person confined in the jail or prison of the same county where such justice or clerk may reside, to be examined as a witness before such justice or clerk. And in cases where the testimony of any prisoner is needed in a proceeding before a justice of the peace, or a clerk, and such person be confined in a county in which such justice or clerk does not reside, application for habeas corpus to testify may be made to any judge of the supreme or superior court.

Code, s. 1664; 1868-9, c. 116, s. 38.

1836. Application, what to contain. The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant, and shall state—

1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes.

Code, s. 1665; 1868-9, c. 116, s. 39.

1837. How and by whom served. The writ of habeas corpus to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this chapter for the service and enforcement of the writ of habeas corpus cum causa.

Code, s. 1666; 1868-9, c. 116, s. 40.

1838. Applicant to pay expenses and give bond. The service of the writ shall not be complete, however, unless the applicant for the same shall tender to the person in whose custody the prisoner may be, if such person be a sheriff, coroner, constable or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he shall also give bond, with sufficient security, to such sheriff, coroner, constable or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner.

Code, s. 1667; 1868-9, c. 116, s. 41.

1839. Duty of officer; penalty. It shall be the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ be directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same shall have been issued the sum of five hundred dollars.

Code, s. 1668; 1868-9, c. 116, s. 42.

1840. Prisoner remanded. After having testified the prisoner shall be remanded to the prison from which he was taken.

Code, s. 1669; 1868-9, c. 116, s. 43.

NOTE. For costs of habeas corpus, see Costs.

CHAPTER 40.

HUNTING.

| | Sections. |
|--------------------------|-----------|
| I. Audubon society, | 1841—1846 |
| II. Game wardens, | 1847—1849 |
| III. Bird and game fund, | 1850 |
| IV. Nonresident hunters, | 1851—1853 |
| V. Game birds, | 1854—1859 |
| VI. Close season, | 1860—1869 |

I. AUDUBON SOCIETY.

1841. Incorporated. J. Y. Joyner, T. Gilbert Pearson, R. H. Lewis, A. H. Boyden, H. H. Brimley, P. D. Gold, Jr., J. F. Jordan and R. N. Wilson are hereby created a body politic and corporate under the name and style of the Audubon Society of North Carolina, and by that name and style they and their associates and successors shall have perpetual succession, with power to take and hold, either by gift, grant, purchase, devise, bequest or otherwise, any real or personal estate, not exceeding fifty thousand dollars in value, for the general use and advancement of the purposes of the said corporation, or for any special purpose, consistent with the charter; and such property shall be exempt from taxation; to make rules and by-laws; to have and to use a common seal, and to change the same at pleasure; and to do and perform all such acts and things as are or may become necessary for the advancement and furtherance of the corporation.

1903 (Pr.), c. 337.

1842. Officers of. The officers of said corporation shall be a president, vice-president, secretary and treasurer, and such other officers as may be fixed by the by-laws.

1903 (Pr.), c. 337, s. 2.

1843. Objects for which created. The objects for which the corporation is formed are to promote among the citizens of North Carolina a better appreciation of the value of song and insectivorous birds to man and the state; to encourage parents and teachers to give instruction to children on the subject; to stimulate public sentiment against the destruction of wild birds and their eggs; to secure the enactment and enforcement of proper and necessary laws for the protection and preservation of birds and game of the state; to provide for the naming of special officers and investing them with nec-

essary power, who shall work under the direction and control of the Audubon Society of North Carolina, looking to the rigid enforcement of the game and bird protective laws of the state; to distribute literature bearing on these topics among the members of the society and other persons, and to raise and provide funds for defraying the necessary expenses of the society in the accomplishment of the purposes herein named.

1903 (Pr.), c. 337, s. 3.

1844. Hunters' license; form of prescribed by. The Audubon Society of North Carolina shall prescribe the form of license for nonresident hunters, and shall furnish to the clerks of the superior courts all licenses and other blanks required under the game laws, and shall also furnish to the clerks of the superior courts a bound book, for the purpose of keeping a record of all hunters' licenses that may be issued.

1903 (Pr.), c. 337, s. 10.

1845. Grants certificates to take birds or eggs. The Audubon Society of North Carolina may issue a certificate to any properly accredited persons of the age of twelve years and upward, permitting the holder thereof to collect birds, their nests or eggs for strictly scientific purposes; said certificate shall be in force only during the calendar year in which issued, and shall not be transferable. In order to obtain such certificates the applicant for same must present to the persons having authority to grant such certificates written testimonials from two well-known scientific men, certifying to the good character and fitness of said applicant to be intrusted with such privilege, and must pay the said society one dollar to defray the necessary expenses attending the granting of such certificate. On satisfactory proof that the holder of such certificate has killed any bird or taken the nests or eggs of any birds other than for scientific purposes, his certificate shall become void, and he shall be further subject for each offense to the penalty provided for such violation of the law.

1903, (Pr.), c. 337, s. 5.

1846. Governor appoints treasurer of society and game wardens. The governor, upon the recommendation of the Audubon Society of North Carolina, shall, from time to time appoint bird and game wardens, and the treasurer of the society, whose terms of office, unless otherwise provided for, shall be during good behavior or until their successors are appointed. The governor shall issue to the treasurer of the Audubon Society, and to each person appointed as warden, a commission, and shall transmit such commission to the

clerk's office of the superior court for the county from which the prospective treasurer or bird and game warden is appointed; and no tax or fee shall be charged or collected for said commission. Any of the said wardens may be removed by the governor upon proof satisfactory to him that they are not fit persons for said position. The compensation of said wardens shall be fixed and paid by the said society.

1903 (Pr.), c. 337, s. 12.

II. GAME WARDENS.

1847. Oath of; bond; badge; act as constables. Every person appointed as warden shall, before entering upon the duties of his office, take and subscribe before the clerks of the superior courts of the county in which he resides an oath to perform the duties of said office, together with the other oaths prescribed for police officers, and execute a bond in the sum of one hundred dollars for the faithful discharge of his duties, and the said oath and bond shall be recorded by the clerk in his office, and the wardens so qualified shall possess and exercise all the powers and authority held and exercised by the constable at common law and under statutes of this state. The clerk shall not charge more than fifty cents for taking and recording said oath. The bird and game wardens, when acting in their official capacity, shall wear in plain view a metallic shield with the words "Bird and Game Warden" inscribed thereon.

1903 (Pr.), c. 337, s. 15.

1848. Powers. Duly appointed and qualified game and bird wardens shall, upon making an affidavit before a justice of the peace or any court of the state that there exists reasonable grounds to believe that any game or birds are in the possession of any common carrier in violation of the law, be entitled to a search warrant and to open, enter and examine all cars, warehouses and receptacles of common carriers in the state, where they have reason to believe any game or birds that have been taken or are held in violation of the law are to be found, and to seize such game or birds. It shall be the duty of said game and bird wardens to prosecute all persons or corporations having in their possession any bird or game contrary to the bird and game laws of this state. It shall be their duty to see that the bird and game laws are enforced and to obtain information as to all violation of said bird and game laws: Provided, that in Currituck county it shall be the duty of said wardens to also see to the enforcement of all laws relating to fishing in said county.

1903 (Pr.), c. 337, s. 13.

1849. Birds seized by, sold. Any bird or animal caught, taken, killed, shipped, or received for shipment, had in possession or under

control by any person or corporation contrary to the provisions of law, which may come into the possession of the bird and game warden, shall be sold at auction, and the bird and game warden disposing of the same shall issue a certificate to the purchaser certifying that the said birds or animals were legally obtained and possessed, and any one so acquiring said birds or animals can have the right to use them as if the same had been sold, killed or possessed in accordance with the law. The money received from the sale of such confiscated birds or game shall be forwarded by the game warden to the treasurer of the state and be placed to the account of the Bird and Game Fund.

1903 (Pr.), c. 337, s. 14.

III. BIRD AND GAME FUND.

1850. How paid out. The funds received by the treasurer of the state from the license tax on nonresident hunters shall constitute a fund known as the Bird and Game Fund, which fund shall be paid out by the treasurer of the state on the order of the treasurer of the Audubon Society of North Carolina, who shall make an annual report to the governor of the receipts and expenditures of the society for the year.

P. L. 1903, c. 337, s. 10.

IV. NONRESIDENT HUNTERS.

1851. Procure license, effect of. Any nonresident who desires to hunt in any part of the state shall make application to the clerk of the superior court of any county, who shall issue such license upon the payment of a tax of ten dollars and the clerk's fee. The license shall expire on the termination of the hunting season as fixed for the several counties. The license to be of such form as the Audubon Society of North Carolina may prescribe, and shall entitle the owner to hunt anywhere in the state except upon private property, which he shall not do without the written consent of the owner. The license may be revoked by the Audubon Society upon proof that the holder has hunted in violation of the law. No license shall be granted to any person whose license has been revoked, for a period of one year thereafter. Such license shall not authorize the holder to hunt in any county at any time or in any manner other than is provided by law for hunting in such county.

P. L. 1903, c. 337, ss. 10, 17.

1852. May take quail out of state. Any person holding a hunter's license to hunt in North Carolina shall be permitted to take out of the state fifty partridges or quail in a season.

P. L. 1903, c. 337, s. 11.

1853. License, issued by clerk. The clerk of the superior court shall issue hunters' licenses as provided for by law, and shall keep in a bound book a record of each license issued, and shall make a report on the first day of December of each year and at the close of the hunting season for their respective counties to the Audubon Society, on forms provided by said society, and shall at the same time transmit all funds received for such license to the treasurer of the state.

P. L. 1903, c. 337, s. 10.

NOTE. For form of license, see s. 1844.

V. GAME BIRDS.

1854. What are. Under the laws of this state, the following only shall be considered game birds: Loons, and grebes, swans, geese, brant; river, fish and sea ducks, rails, coots, marsh-hens and gallinules, plovers, shore and surf birds, snipe, woodcock, sandpipers, yellow legs, chewink or tohee and curlews, and the wild turkey, grouse, partridge, pheasant, quail, dove, robin and meadow lark.

P. L. 1903, c. 337, s. 4.

1855. Birds kept as pets, or for breeding. It shall be lawful to keep any wild bird in a cage as a domestic pet, or for the purposes of breeding, raising and domesticating.

P. L. 1903, c. 337, ss. 6, 7.

1856. License tax on clubhouses, Dare county. Every clubhouse, shooting lodge, or other place of resort for sportsmen, situated in that part of Dare county lying south of a line passing east and west, through the extreme northern end of Roanoke island, shall pay a license tax of twenty-five dollars a year, which said license shall entitle the members and guests of each club, lodge or resort to shoot wild fowl afloat within four miles of said clubhouse or lodge without further taxation.

1899, c. 133, s. 2.

1857. Nonresidents shooting from blinds or batteries in Dare county, south of Roanoke island. Nonresidents not exceeding two at the same time may shoot wild fowl in the waters of that part of Dare county lying south of a line passing east and west through the extreme northern end of Roanoke island, from a blind, battery, box, or float, where such blind, battery, box, or float is the property of a resident of Dare county and a license tax of five dollars per annum has been paid on that blind, battery, box or float.

1899, c. 133, s. 3; 1901, c. 157.

1858. License tax on nonresidents in Dare county. Every non-resident of this state shall, before shooting any wild fowl in the waters of that part of Dare county lying north of a line passing east and west through the northern end of Roanoke island, from any blind, battery, box, float or raft pay a license tax of twenty-five dollars a year.

1897, c. 415; 1899, c. 133.

1859. License taxes for hunting wild fowl in Dare county. All license taxes imposed for hunting wild fowl in Dare county, or for lodges, clubhouses or resorts for sportsmen, or upon boxes, batteries, or floats shall be paid to the clerk of the superior court, who shall issue the license. All such license taxes shall be by the clerk of the superior court paid over to the treasurer of the county for the benefit of the school fund.

1897, c. 415; 1899, c. 133.

VI. CLOSE SEASON.

1860. Deer. The close season of each year, during which deer shall not be hunted with gun, chased with dogs, killed, trapped or destroyed, shall, as to the several counties or parts of counties, be as follows:

New Hanover, Pender and all counties lying wholly west of the Wilmington and Weldon Railroad, except as hereinafter specifically provided, between the first day of February and the first day of October.

Bertie, between the first day of February and the first day of August.

Brunswick, between the first day of January and the first day of September.

Burke, between the first day of January and the first day of October.

Caswell, until the first of October, one thousand nine hundred and seven, and thereafter between the first day of February and the first day of October.

Columbus, within one-half mile of Lake Waccamaw, between the first day of January and the first day of October.

Currituck, on the North river side of Poplar Branch township, between the first day of March and the twentieth day of September.

Dare, between the first day of March and the fifteenth day of October.

Hyde, between the fifteenth day of February and the first day of August, except that part of said county north and northeast of Mattamuskeet lake, and between Alligator and Long Shoal rivers.

McDowell, until the first day of October, one thousand nine hundred and seven, and thereafter between the first day of February and the first day of October.

Mitchell, between the first day of January and the first day of October, except Grassy Creek and Snow Creek townships, there between the fifteenth day of November and the fifteenth day of October next ensuing.

Northampton, between the fifteenth day of February and the fifteenth day of October.

Ouslow, in the waters of New river, or within one hundred yards thereof all the year.

Randolph, until the first day of October, one thousand nine hundred and eight, and thereafter between the first day of February and the first day of October.

Richmond, between the fifteenth day of February and the fifteenth day of August.

Robeson, between the first day of January and the first day of November.

Tyrrell, between the first day of February and the fifteenth day of October.

Wilkes, until the first day of October, one thousand nine hundred and eight, and thereafter between the first day of February and the first day of October.

Code, s. 2832; 1885, c. 21; 1885, c. 48; 1887, c. 75; 1889, c. 5; 1889, c. 149; 1889, c. 210; 1889, c. 345; 1889, c. 489; 1889, c. 531; 1889, c. 538; 1891, c. 234; 1893, c. 107; 1893, c. 232; 1893, c. 352; 1893, c. 358; 1893, c. 470; 1895, c. 62; 1893, c. 442, s. 2; 1897, c. 59; 1897, c. 81; 1897, c. 82; 1897, c. 283; 1897, c. 404; 1899, c. 121; 1901, c. 372; 1901, c. 601; 1901, c. 573; 1901, c. 65; 1901, c. 153; 1901, c. 372; 1903, c. 196; 1903, c. 303; 1903, c. 694; 1903, c. 128.

1861. Squirrel. The close season, or time in each year during which no squirrel shall be hunted, killed, or in any way captured, shall be, as to the counties hereinafter stated, as follows:

Beaufort, Chowan, Cleveland, Mecklenburg, Perquimans and Pitt, from the first day of March to the first day of November.

Bertie and Martin, from the first day of March to the fifteenth day of August.

Pamlico, from the first day of March to the first day of September.

Northampton, from the fifteenth day of February to the fifteenth day of November.

Pasquotank, Tyrrell and Warren, from the first day of March to the first day of October.

1895, c. 443; 1897, c. 454; 1889, c. 343; 1901, c. 676; 1903, c. 103; 1903, c. 118; 1903, c. 196; 1903, c. 440.

1862. Opossum. The close season, or time in each year during which no opossum shall be shot, killed, hunted or in any way captured, shall be, as to the counties of Alamance, Caswell, Chatham, Durham, Franklin, Graham, Guilford, Halifax, Mecklenburg, Moore, Orange, Pamlico, Wake and Warren, from the first day of February to the first day of October.

1891, c. 542; 1893, c. 21; 1893, c. 59; 1893, c. 160; 1893, c. 371; 1895, c. 84; 1901, c. 676; 1891, c. 545.

1863. Rabbit. The close season for rabbit in Warren county shall be from the first day of March to the first day of October, and no rabbit shall be hunted, shot, killed or captured in Warren county between those dates in any year.

1903, c. 440.

1864. Quail or partridges. The close season, or time in each year during which quail and partridges shall not be shot, killed, wounded, or in any manner hunted, taken or captured, shall be from the fifteenth day of March to the first day of November, except as to those counties for which a different time is hereinafter stated, as follows:

Beaufort, Bertie, Camden, Chatham, Currituck and Warren, from the first day of March to the first day of November.

Buncombe, from the first day of January to the fifteenth day of November.

Cabarrus, Cherokee, Davidson, Montgomery, Pasquotank, Perquimans, Randolph and Wilson, from the first day of March to the fifteenth day of November.

Clay, Davie, Rowan, from the first day of March to the first day of December.

Dare, Granville, Tyrrell and Vance, from the first day of March to the fifteenth day of October.

Gaston, from the tenth day of January to the first day of December.

Henderson, from the first day of April to the fifteenth day of November.

Hyde, from the twentieth day of March to the fifteenth day of October.

Iredell, from the first day of February to the first day of December, except Eagle Mill, Union Grove and Turnersburg townships, in which the close season is from the fifteenth day of March to the first day of November.

Lincoln and Surry, from the first day of February to the first day of December.

Mecklenburg, from the tenth day of January to the first day of December.

Nash, from the first day of February to the first day of November.

New Hanover and Richmond, from the first day of April to the fifteenth day of October.

Pamlico, from the first day of March to the first day of September.

Union, from the fifteenth day of January to the fifteenth day of December.

Columbus, Graham, Jones, Macon, Onslow and Swain have no close season.

Code, s. 2834; 1885, cc. 204, 395; 1891, cc. 79, 294; 1893, cc. 19, 118, 339, 361; 1895, cc. 109, 209; 1897, cc. 74, 146, 266, 282, 283, 293, 423; 1899, c. 157; 1901, cc. 344, 355, 359, 415, 437, 679; 1903, cc. 147, 255, 281, 304.

1865. Wild turkey. The close season, or time in each year during which no wild turkey shall be shot, killed, wounded, or in any manner hunted, taken, or captured, shall be from the fifteenth day of March to the first day of November, except as to those counties as to which a different time is hereinafter stated, as follows:

Bertie, from the first day of March to the first day of November.

Cabarrus, Cherokee, Davidson and Wilson, from the first day of March to the fifteenth day of November.

Chatham and Warren, from the first day of March to the first day of November.

Clay, Davie, Randolph and Rowan, from the first day of March to the first day of December.

Granville, from the first day of March to the fifteenth day of October.

Henderson, from the first day of April to the fifteenth day of November.

Macon, from the first day of May to the fifteenth day of October.

Pamlico, from the first day of March to the first day of October.

Pender, from the first day of February to the first day of October.

Richmond, from the first day of April to the fifteenth day of October.

Union and Vance, from the fifteenth day of March to the fifteenth day of October.

Carteret, Columbus, Dare, Graham, Jones, Onslow, Stanly, Swain, Tyrrell have no close season for wild turkeys.

Code s. 2834; 1885, cc. 204, 395, 396, 398, 399; 1887, c. 82; 1891, cc. 79, 294; 1893, cc. 118, 373; 1895, cc. 109, 442; 1897, cc. 74, 85, 146, 266, 284, 558; 1899, c. 152; 1901, cc. 133, 344, 355, 359, 361, 383, 415, 437, 469, 551, 676; 1903, cc. 94, 147, 255, 280, 281, 286, 304, 345, 363, 463, 659.

1866. Dove, robin and lark. The close season, or time in each year during which no dove, robin or lark shall be shot, killed, wounded, or in any manner hunted, taken or captured, shall be from

the fifteenth day of March to the first day of November, except as to those counties as to which a different time is hereinafter stated as follows:

Bertie, from the first day of March to the first day of November.

Cabarrus and Cherokee, from the first day of March to the fifteenth day of November.

Davidson and Richmond, from the first day of April to the fifteenth day of October.

Davie, from the first day of March to the first day of December.

Granville, from the first day of March to the fifteenth day of October.

Henderson, from the first day of April to the fifteenth day of November.

Mecklenburg, from the first day of February to the fifteenth day of November.

Rowan, from the first day of March to the first day of December.

Union, from the fifteenth day of January to the fifteenth day of December.

Vance, from the fifteenth day of March to the fifteenth day of October.

Warren, from the first day of March to the first day of November.

Carteret, Craven, Columbus, Duplin, Graham, Jones, Macon, Onslow, Pamlico, Moore, Swain and Wilson have no close season, Edgecombe has no close season as to doves.

Code s. 2834; 1885, cc. 201, 204, 395; 1889, c. 32; 1891, cc. 79, 232, 294; 1893, cc. 118, 239; 1895, c. 109; 1897, cc. 146, 284; 1901, cc. 133, 344, 355, 359, 415, 437; 1903, 147, 255, 280, 304.

1867. Pheasant. The close season, or time in each year during which no pheasant shall be shot, killed, wounded, or in any manner captured or taken, shall be as follows:

Buncombe county, from the first day of January to the fifteenth day of November.

Cherokee county, from the first day of March to the fifteenth day of November.

Clay county, from the first day of March to the first day of December.

Henderson county, from the first day of April to the first day of November.

Rowan county, from the first day of February to the first day of December.

1901, c. 437; 1903, cc. 281, 304, 353, 463.

1868. Woodcock. The close season, or time in each year during which no woodcock shall be hunted, killed or in any way taken or captured shall be as follows:

Cherokee county, from the first day of March to the first day of November.

Henderson county, all the year.

Randolph county, from the first day of March to the first day of November.

Rowan county, from the first day of February to the first day of December.

1901, c. 437; 1903, cc. 304, 353; 1897, c. 146.

1869. Snipe. The close season, or time in each year during which no snipe, marsh hen, curlew and other shore birds shall be hunted, killed, or in any way taken, shall be as follows:

Henderson county, all the year, except snipe, as to which there is no close season.

Cherokee county, from the first day of March to the fifteenth day of November.

New Hanover county, from the first day of April to the first day of September.

1887, c. 82; 1901, c. 437; 1903, c. 174, 353.

NOTE. For penalty for hunting during close seasons, see Crimes.

CHAPTER 41.

IDIOTS, INEBRIATES AND LUNATICS.

| | Sections. |
|-----------------------|-----------|
| I. Guardian of, | 1870—1875 |
| II. Sales of estates, | 1876—1878 |
| III. Surplus income, | 1879—1887 |

I. GUARDIAN OF.

1870. Inquisition; guardian appointed. Any person, in behalf of one who is deemed an idiot, inebriate, or lunatic, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed idiot, inebriate or lunatic resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed idiot, inebriate or lunatic, to the sheriff of the county, commanding him to sum-

mon a jury of twelve men to inquire into the state of such supposed idiot, inebriate or lunatic. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic or incompetent person by inquisition of a jury, as in cases of orphans.

Code, s. 1670; C. C. P., s. 473.

Note. See *Guardian*, s. 1745.

1871. Guardian appointed on certificate from hospital for insane. If any person be confined in any hospital for insane persons, the certificate of the superintendent of such hospital declaring such person to be of insane mind and memory, which certificate shall be sworn to and subscribed before the clerk of the superior court of the county in which such hospital is situated, and certified under the seal of court, shall be sufficient evidence to authorize the clerk to appoint a guardian for such idiot, lunatic or insane person.

Code, s. 1673; 1860-1, c. 22.

1872. Inebriates defined. Any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors, narcotics or drugs to such an extent as to stupefy his mind and to render him incompetent to transact ordinary business with safety to his estate, or who shall render himself, by reason of the use of intoxicating liquors, narcotics or drugs, dangerous to person or property, or who shall, by the frequent use of liquor, narcotics or drugs, render himself cruel and intolerable to his family, or shall fail from such cause to provide his family with reasonable necessities of life, shall be deemed an inebriate: Provided, the habit of so indulging in such use shall have been at the time of inquisition of at least one year's standing.

Code, s. 1671; 1891, c. 15, s. 7; 1903, c. 543; 1879, c. 329.

Note. For rules for admission into hospitals, see *Hospitals for Insane*.

1873. Reformation and restoration to sanity or sobriety. Whenever an insane person or inebriate shall become of sound mind and memory, or shall become competent to manage his property, he shall be authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his residence, setting forth the facts duly verified by the oath of the petitioner, whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the said alleged sane person, formerly a

lunatic, or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury find that the person whose mental or physical condition inquired of is sane and of sound mind and memory, or is no longer an inebriate, as the case may be, the said person shall be authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or inebriate.

Code, s. 1672; 1901, c. 191; 1903, c. 80; 1879, c. 324, s. 4.

1874. Estates without guardian managed by clerk. Whenever any person is declared to be of nonsane mind or inebriate, and for whom no suitable person will act as guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed.

Code, s. 1676; R. C., c. 57, s. 6; 1846, c. 43, s. 1.

1875 Allowance to abandoned feme covert lunatic. Whenever any feme covert lunatic shall be abandoned by her husband, she may, by her guardian, or next friend, in case there be no guardian, apply to the clerk of the superior court for support and maintenance, which the clerk may decree as in cases of alimony, out of any property or estate of her husband.

Code, s. 1686; 1858-9, c. 52, s. 1.

NOTE. See Divorce and Alimony.

Deemed to have pleaded statutes of limitations, see s. 323.

II. SALES OF ESTATES.

1876. Clerk may order sale or renting. Whenever it shall appear to any clerk of the superior court by report of the guardian of any idiot, inebriate or lunatic, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. Such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale, and shall be entered at length on the records of the court; and all sales and rentings made under this section shall be valid to convey the interest and estate directed to be sold, and the title thereof shall be conveyed by such person as the clerk may appoint on confirming the sale; or the clerk may direct the guardian to file his petition for such purpose.

Code, s. 1674; R. C., c. 57, s. 4; 1801, c. 589.

1877. How and for what purpose sold; parties; disposition of proceeds. Whenever it shall appear to the clerk, upon the petition

of the guardian of any idiot, inebriate or lunatic, that a sale of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or whenever the clerk shall be satisfied that the interest of the idiot, inebriate or lunatic would be materially and essentially promoted by the sale of any part of such estate; or whenever any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge: Provided, that the clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such nonsane person or inebriate. And if on the hearing the clerk shall order such sale, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardian.

Code, s. 1675; R. C., c. 57, s. 5.

1878. Land of wife of lunatic, how sold. Where the wife of a lunatic owns real estate in her own right the sale of which will promote her interest, a sale of the same may be made upon the order of the clerk of the superior court of the county where the land lies, upon the petition by the wife of said lunatic and the guardian of the lunatic husband, and the proceeds of said sale shall be paid to the wife of said lunatic.

Code, s. 1687; 1881, c. 361.

III. SURPLUS INCOME.

1879. When advanced to next of kin. Whenever any nonsane person, of full age, and not having made a valid will, shall have children or grandchildren (such grandchildren being the issue of a deceased child), and shall be possessed of an estate, real or personal, whose annual income shall be more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessities and suitable comforts of life, it may be lawful for the clerk of the superior court for the county in which such person shall have his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person.

Code, s. 1677; R. C., c. 57, s. 9.

1880. For what purpose and to whom advanced. Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of twenty-one years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement; and in case the child, or grandchild, be a feme covert, the sum advanced shall be paid or secured to her for her sole and separate use.

Code, s. 1678; R. C., c. 57, s. 10.

1881. Distributees, parties. In every application for such advancements, the guardian of the nonsane person, and all such other persons, shall be parties, as would at that time be entitled to a distributive share of his estate, if he were then dead.

Code, s. 1679; R. C., c. 57, s. 11.

1882. Advancements, equal; accounted for, when. The clerk, in ordering such advancements, shall, as far as practicable, so order the same, as that, on the death of the nonsane person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death, every sum advanced to a child, or grandchild, shall be an advancement, and shall bear interest from the time it may be received.

Code, s. 1680; R. C., c. 57, s. 12.

1883. Clerk may select those to advance. When the surplus aforesaid shall not be sufficient to make distribution among all the parties, the clerk may select and decree advancements to such of them as may most need the same, and may apportion the sum decreed in such amounts as shall be expedient and proper.

Code, s. 1681; R. C., c. 57, s. 13.

1884. Secured against waste. It shall be the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same when they may have families, that it may be applied to their support and comfort, but any sum so advanced shall be regarded as an advancement to such persons.

Code, s. 1682; R. C., c. 57, s. 14.

1885. Appeal; removal to superior court. Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court.

Code, s. 1683; R. C., c. 57, s. 15.

1886. Advancements only when insanity permanent. No such application shall be allowed under this chapter but in cases of such permanent and continued insanity, as that the nonsane person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion.

Code, s. 1684; R. C., c. 57, s. 16.

1887. Decree suspended when sane. Upon such insane person being restored to sanity, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same.

Code, s. 1685; R. C., c. 57, s. 17.

NOTE. For powers, duties and liabilities of guardian, see Guardian.
Sue by guardian or next friend, see ss. 365-367.

CHAPTER 42.

INNKEEPERS.

(Sections 1888—1893.)

1888. Must furnish accommodations. Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel.

1903, c. 563.

1889. Liability for loss of baggage. Innkeepers shall not be liable for loss, damage or destruction of the baggage or property of their guests except in case such loss, damage, or destruction results from the failure of the innkeeper to exercise ordinary, proper and reasonable care in the custody of such baggage and property, and in case of such loss, damage or destruction resulting from the negligence and want of care of the said innkeeper he shall be liable to the owner of the said baggage and property to an amount not exceeding one hundred dollars: Provided, however, any guest may at any time before a loss, damage or destruction of his property notify the innkeeper in writing that his property exceeds in value the said sum of one hundred dollars, and shall upon demand of the innkeeper furnish him a list or schedule of the same, with the value thereof, in which case the innkeeper shall be liable for the loss, damage or destruction of said property because of any negligence on his part

for the full value of the same: Provided further, that proof of the loss of any such baggage, except in case of damage or destruction by fire, shall be prima facie evidence of the negligence of said hotel or innkeeper.

1903, c. 563, s. 2.

1890. Safe-keeping of valuables. It shall be the duty of innkeepers, upon the request of any guest, to receive from said guest and safely keep money, jewelry and valuables to an amount not exceeding five hundred dollars; and no innkeeper shall be required to receive and take care of any money, jewelry or other valuables to a greater amount than five hundred dollars: Provided, the receipt given by said innkeeper to said guest shall have plainly printed upon it a copy of this section. No innkeeper shall be liable for the loss, damage or destruction of any money or jewels not so deposited.

1903, c. 563, s. 3.

1891. Loss by fire. No innkeeper shall be liable for loss, damage or destruction of any baggage or property caused by fire not resulting from the negligence of the innkeeper or by any other force over which the innkeeper had no control: Provided, that nothing herein contained shall enlarge the limit of the amount to which the innkeeper shall be liable as provided in preceding sections.

1903, c. 563, s. 4.

1892. Copies of this chapter posted. Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this chapter and of all regulations relating to the conduct of guests. This chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted.

1903, c. 563, ss. 5, 6.

1893. Negligence of guest. Any innkeeper against whom claim is made for loss sustained by a guest may show that such loss resulted from the negligence of such guest or of his failure to comply with the reasonable and proper regulations of the inn.

1903, c. 563, s. 7.

NOTE. For lien of innkeepers on baggage and other property, see Liens, s. 2017.

CHAPTER 43.

INSOLVENT DEBTORS.

| | Sections. |
|--------------------------------------|-----------|
| I. Criminal actions, | 1894—1899 |
| II. Civil actions—under arrest, | 1900—1909 |
| III. Civil actions—not under arrest, | 1910—1914 |
| IV. General provisions, | 1915—1921 |
| V. Under sentence, | 1922—1928 |

I. CRIMINAL ACTIONS.

1894. Who may be discharged from prison. The following persons may be discharged from imprisonment upon complying with this chapter:

1. Every putative father of a bastard committed for a failure to give bond, or to pay any sum of money ordered to be paid for its maintenance.

2. Every person committed for the fine and costs of any criminal prosecution.

Code, s. 2967; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 26.

1895. When petition filed, on whom served. Every such person, having remained in prison for twenty days, may apply by petition to the court, where the judgment against him was entered, praying to be brought before such court at a time and place to be named in the petition, and to be discharged upon taking the oath hereinafter prescribed. The applicant shall cause ten days' notice of the time and place of filing the petition to be served on the sheriff or other officer by whom he was committed. In cases of conviction before a justice of the peace the clerk of the superior court of the county where the convicted person confined for costs is, may administer the oath and discharge the prisoner.

Code, ss. 2968, 2969; 1891, c. 195; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 28; 1874-5, c. 11; 1868-9, c. 162, s. 27; 1873-4, c. 90.

1896. Warrant issued for prisoner. The clerk of the superior court, or justice of the peace before whom such petition is presented, shall forthwith issue a warrant to the sheriff, or keeper of the prison, requiring him to bring the prisoner before the court,

at the time and place named for the hearing of the case, which warrant every such sheriff or keeper shall obey.

Code, s. 2970; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 29.

1897. Proceeding on application. At the hearing of the petition, if the prisoner have no visible estate, and take and subscribe the oath or affirmation prescribed in the succeeding section, the clerk of the superior court, or justice of the peace before whom he is brought, shall administer said oath or affirmation to him, and discharge him from imprisonment; of which an entry shall be made in the docket of the court, and, where the proceeding is before a justice of the peace, the justice shall return the petition and orders thereon into the office of the clerk of the superior court to be filed.

Code, s. 2971; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 30.

1898. Oath to be taken. The oath referred to in the preceding section shall be as follows:

I,, do solemnly swear (or affirm) that I have not the worth of fifty dollars in any worldly substance, in debts, money or otherwise whatsoever, and that I have not at any time since my imprisonment or before, directly or indirectly, sold or assigned, or otherwise disposed of, or made over in trust for myself or my family, any part of my real or personal estate, whereby to have or expect any benefit, or to defraud any of my creditors; so help me, God.

Code, s. 2972; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 31; 1881, c. 76.

1899. Who may suggest fraud. The chairman of the board of commissioners, and every officer interested in the fee bill taxed against such prisoner, may oppose his taking the oath prescribed in the preceding section, and file particulars of the suggestion in writing, in the court where the same shall stand for trial as prescribed in this chapter in other cases of fraud or concealment.

Code, s. 2973; 1868-9, c. 162, s. 32.

II. CIVIL ACTIONS—UNDER ARREST.

1900. Who entitled. The following persons are entitled to the benefit of this chapter:

1. Every person taken or charged on any order of arrest for default of bail, or on surrender of bail in any action.

2. Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever.

Code, s. 2951; 1868-9, c. 162, s. 10.

1901. When petition may be filed. Every person taken or charged as in the preceding section specified, may, at any time after his arrest or imprisonment, petition the court from which the process issued on which he is arrested or imprisoned, for his discharge therefrom, on his compliance with this chapter.

Code, s. 2952; R. C., c. 59, s. 3; 1868-9, c. 162, s. 11.

1902. The petition; verification. The petition shall set forth the cause of the imprisonment, with the writ or process and complaint on which the same is founded, and shall have annexed to it a just and true account of all his estate, real and personal, and of all charges affecting such estate, as they exist at the time of filing his petition, together with all deeds, securities, books or writings whatever relating to the estate and the charges thereon; and also what property, real and personal, the petitioner claims as exempt from sale under execution, and shall have annexed to it an oath or affirmation, subscribed by the petitioner and taken before any person authorized by law to administer oaths, to the effect following:

I,, the within named petitioner, do swear (or affirm) that the within petition and account of my estate, and of the charges thereon, are, in all respects, just and true; and that I have not at any time or in any manner disposed of or made over any part of my property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors; so help me, God.

Code, ss. 2953, 2954; R. C., c. 59, s. 3; 1868-9, c. 162, ss. 12, 13.

1903. What notice given, and to whom. Twenty days' notice of the time and place at which the petition will be filed, together with a copy of such petition and the account annexed thereto, shall be personally served by such debtor on the creditor or creditors at whose suit he is arrested or imprisoned, and such other creditors as the debtor may choose, or their personal representatives or attorneys; and if the person to be notified reside out of the state, and have no agent or attorney in the state, the notice may be served on the officer having the claim to collect, or by two weekly publications in any newspaper in the state.

Code, s. 2955; R. C., c. 59, ss. 3, 20; 1773, c. 100, s. 8; 1868-9, c. 162, s. 14.

1904. Who may suggest fraud. Every creditor upon whom the notice directed in the preceding section is served may suggest fraud upon the hearing of the petition, and the issues made up respecting the fraud shall stand for trial as in other cases.

Code, s. 2956; R. C., c. 59, s. 13; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 15.

1905. When no fraud suggested, debtor discharged. If no creditor suggest fraud or oppose the discharge of the debtor, the justice

of the peace or the clerk of the superior court before whom the petition is heard, shall forthwith discharge the debtor, and, if he surrender any estate for the benefit of his creditors, shall appoint a trustee of such estate. The order of discharge and appointment shall be entered in the docket of the court, and if granted by a justice of the peace a copy thereof shall be certified by him to the clerk of the superior court, where the same shall be recorded, and filed.

Code, s. 2957; R. C., c. 59, s. 1; 1773, c. 100; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 16.

1906. Cause continued, when. Whenever it appears to the court that any debtor, who may have given bond for his appearance under this chapter, is prevented from attending court by sickness or other sufficient cause, the case shall be continued to another day, or to the next term, when the same proceedings shall be had as if the debtor had appeared according to the condition of his bond, and in the event of his death in the meantime, his bond shall be discharged.

Code, s. 2959; R. C., c. 59, s. 10; 1822, c. 1131, s. 1; 1868-9, c. 162, s. 18.

1907. Issue of fraud, how debtor discharged. After an issue of fraud or concealment is made up, the debtor shall not discharge himself as to the creditors in that issue, except by trial and verdict in the same, or by a discharge by consent.

Code, s. 2962; R. C., c. 59, s. 17; 1868-9, c. 162, s. 21.

1908. Fraud found; imprisoned, how. If, on the trial, the jury find that there is any fraud or concealment, the judgment shall be that the debtor be imprisoned until a full and fair disclosure and account of all his money, property or effects be made by the debtor.

Code, s. 2961; R. C., c. 59, s. 14; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 20.

1909. Effect of order of discharge. The order of discharge under this chapter, whether granted upon a nonsuggestion of fraud, upon the finding of a jury in favor of the debtor, or otherwise, shall be in like terms and have like effect as prescribed in section nineteen hundred and thirteen; except that the body of such debtor shall be free from arrest or imprisonment at the suit of every creditor, and as to him only, to whom the notice required may have been given; and the notices, or copies thereof, shall in all cases be filed in the office of the superior court clerk.

Code, s. 2960; R. C., c. 59, s. 11; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 19.

III. CIVIL ACTIONS—NOT UNDER ARREST.

1910. May file petition; what to contain; how verified. Every insolvent debtor may present a petition in the superior court, praying that his estate may be assigned for the benefit of all his creditors, and that his person may thereafter be exempt from arrest or imprisonment, on account of any judgment previously rendered, or of any debts previously contracted. On presenting such petition, every insolvent shall deliver therewith a schedule containing an account of his creditors and an inventory of his estate, which said inventory shall contain—

1. A full and true account of his creditors, with the place of residence of each, if known, and the sum owing to each creditor, whether on written security, on account or otherwise.

2. A full and true inventory of his estate, real and personal, with the incumbrances existing thereon, and all books, vouchers and securities relating thereto.

3. A full and true inventory of all property, real and personal, claimed by him as exempt from sale under execution.

He shall annex to his petition and schedule the following affidavit, which must be taken and subscribed by him before the clerk of the superior court, and must be certified by such officer:

I,, do swear (or affirm) that the account of my creditors, with the places of their residence, and the inventory of my estate, which are herewith delivered, are in all respects just and true; that I have not at any time or in any manner disposed of or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with any of my creditors, with a view that they, or any of them, should abstain or desist from opposing my discharge; so help me, God.

Code, ss. 2942, 2943, 2944; 1868-9, c. 162, ss. 1, 2, 3.

1911. Duty of clerk on receiving petition. On receiving the petition, schedule and affidavit, the clerk of the superior court shall make an order requiring all the creditors of such insolvent to show cause before said officer, within thirty days after publication of the order, why the prayer of the petitioner should not be granted, and shall post a notice of the contents of the order at the courthouse door and three other public places in the county where the application is made for four successive weeks; or, in lieu thereof, shall publish the same for three successive weeks in any newspaper published in said county, or in an adjoining county.

Code, ss. 2945, 2946; 1868-9, c. 162, ss. 4, 5.

1912. Discharged, when. If no creditor oppose the discharge of the insolvent, the clerk of the superior court before whom the hear-

ing of the petition is had shall enter an order of discharge and appoint a trustee of all the estate of such insolvent.

Code, s. 2947; 1868-9, c. 162, s. 6.

1913. Order of discharge, terms and effect. The order of discharge shall declare that the person of such insolvent shall forever thereafter be exempted from arrest or imprisonment on account of any judgment, or by reason of any debt due at the time of such order, or contracted for before that time, though payable afterwards. But no debt, demand, judgment or decree against any insolvent, discharged under this chapter, shall be affected or impaired by such discharge, but the same shall remain valid and effectual against all the property of such insolvent acquired after his discharge and the appointment of a trustee; and the lien of any judgment or decree upon the property of such insolvent shall not be in any manner affected by such discharge.

Code, s. 2950; 1868-9, c. 162, s. 9.

1914. Creditor may suggest fraud. Every creditor opposing the discharge of the insolvent may suggest fraud and set forth the particulars thereof in writing, verified by his oath; but the insolvent shall not be compelled to answer the suggestions of fraud in more than one case, though as many creditors as choose may make themselves parties to the issues in such cases.

Code, s. 2948; 1868-9, c. 162, s. 7.

IV. GENERAL PROVISIONS.

1915. Issue of fraud made up, cause docketed for trial. In every case under this chapter where an issue of fraud is made up, the case shall be entered in the trial docket of the superior court, and stand for trial as other causes; and upon a finding by the jury in favor of the petitioner the judge shall discharge the debtor; if the finding be against the petitioner he shall be committed to jail until he make full disclosure.

Code, s. 2949; 1868-9, c. 162, s. 8.

1916. Debtor may give bond. Every debtor entitled to the provisions of this chapter may, at the time of filing his application for a discharge or at any time afterwards, tender to the sheriff or other officer having his body in charge, a bond, with sufficient surety, in double the amount of the sum due any creditor or creditors at whose suit he was taken or charged, conditioned for the appearance of such debtor before the court where his petition is filed, at the hearing thereof, and to stand to and abide by the final order or decree

of the court in the case. If such bond be satisfactory to the sheriff, he shall forthwith release such debtor from custody.

Code, s. 2958; R. C., c. 59, s. 27; 1868-9, c. 162, s. 17.

1917. Surety may surrender principal. The surety in any bond conditioned for the appearance of any person under this chapter, may surrender the principal, or such principal may surrender himself, in discharge of the bond, to the sheriff or other officer of any court where such principal is bound to appear, in the manner provided in the chapter entitled Civil Procedure, subchapter Arrest and Bail.

Code, s. 2963; R. C., c. 59, s. 23; 1793, c. 100, s. 7; 1793, c. 380, s. 1; 1822, c. 1131, s. 3; 1868-9, c. 162, s. 22.

1918. When creditor liable for jail fees. When any debtor is actually confined within the walls of a prison, on an order of arrest in default of bail or otherwise, the jailer must furnish him with necessary food during his confinement, if the prisoner require it, for which the jailer shall have the same fees as for keeping other prisoners. If the debtor be unable to discharge such fees, the jailer may recover them from the party at whose instance the debtor was confined. And at any time after the arrest, the sheriff or jailer may give notice thereof to the plaintiff, his agent or attorney, and demand security of him for the prison fees that accrue after such notice, and if the plaintiff fail to give such security then the sheriff may discharge the debtor out of custody.

Code, s. 2965; R. C., c. 69, s. 5; 1773, c. 100, ss. 8, 9; 1821, c. 1103; 1868-9, c. 162, s. 24.

1919. False swearing, penalty. If any insolvent or imprisoned debtor take any oath prescribed in this chapter falsely and corruptly, and upon indictment for perjury be convicted thereof, he shall suffer all the pains of perjury, and he shall never after have any of the benefits of this chapter, but may be sued and imprisoned as though he had never been discharged.

Code, s. 2964; R. C., c. 59, s. 25; 1793, c. 100, s. 10; 1868-9, c. 162, s. 23.

Note. For additional penalty, see Crimes.

1920. General power of trustees. Any trustee appointed under this chapter, in the several cases therein contemplated, is hereby declared a trustee of the estate of the debtor, in respect to whose property such trustee is appointed for the benefit of creditors, and is invested from the time of appointment with all the powers and authorities, and subject to the control, obligations and responsibilities prescribed by law in relation to personal representatives over

the estates of deceased persons; but all debts shall be paid by the trustees pro rata.

Code, s. 2977; R. C., c. 59, ss. 21, 22; 1773, c. 100, ss. 5, 6; 1827, c. 44; 1830, c. 26, s. 2; 1868-9, c. 162, s. 44.

1921. Who may take jail bounds. Any imprisoned debtor may take the benefit of the prison bounds by giving security, as required by law, except as follows:

1. A debtor against whom an issue of fraud is found.

2. Any debtor who, for other cause, is adjudged to be imprisoned until he make a full and fair disclosure or account of his property.

Code, s. 2966; R. C., c. 59, s. 27; 1818, c. 964; 1868-9, c. 162, s. 25.

V. UNDER SENTENCE.

1922. Confined in jail or penitentiary, who may apply for trustee. Whenever any debtor is imprisoned in the penitentiary for any term whatever, or in a county jail for any term more than twelve months, application by petition may be made by any creditor, the debtor, or by his wife, or any of his relatives, for the appointment of a trustee to take charge of the estate of such debtor.

Code, s. 2974; 1868-9, c. 162, s. 40.

1923. To whom application made when trustee appointed. The application must be made to the superior court of the county where the debtor was convicted; and upon producing a copy of the sentence of such debtor, duly certified by the clerk of the court, together with an affidavit of the applicant that such debtor is actually imprisoned under such sentence, and is indebted in any sum whatever, the clerk of the court or the judge thereof may immediately appoint a trustee of the estate of such debtor.

Code, s. 2975; 1868-9, c. 162, ss. 41, 42.

1924. Duty of trustee. Every trustee is required to pay the debts of the imprisoned debtor in the manner directed in section numbered one thousand nine hundred and twenty; and after paying such debts, the trustee shall apply the surplus, from time to time, to the support of the wife and children of such debtor, under the direction of the superior court; and whenever such imprisoned debtor is lawfully discharged from his imprisonment, the trustee so appointed shall deliver up to him all the estate, real and personal, of such debtor, after retaining a sufficient sum to satisfy the expenses incurred in the execution of the trust and lawful commissions therefor.

Code, s. 2976; 1868-9, c. 162, s. 43.

1925. Trustee to make returns. Such trustee shall make his returns and have his accounts audited and settled by the clerk of the

superior court of the county where the proceeding was had, in like manner as provided for personal representatives.

Code, s. 2978; 1868-9, c. 162, s. 45.

1926. Oath of trustee. Before proceeding to the discharge of his duty, such trustee shall take and subscribe an oath, well and truly to execute his trust according to his best skill and understanding; which oath must be filed with the clerk of the superior court.

Code, s. 2979; 1868-9, c. 162, s. 46.

1927. May appoint several trustees. The court shall have power, when deemed necessary, to appoint more than one person trustee under this chapter; but in reference to the rights, authorities and duties conferred herein, all such trustees shall be deemed one person in law.

Code, s. 2980; 1868-9, c. 162, s. 47.

1928. Court may remove trustee and appoint successor. In case of the death, removal, resignation or other disability of a trustee, the court making the appointment may from time to time supply the vacancy; and all proceedings may be continued by the successor in office in like manner as in the first instance.

Code, s. 2981; 1868-9, c. 162, s. 48.

CHAPTER 44.

INSPECTION.

(Section 1929.)

1929. Lumber inspectors for certain counties. The board of county commissioners of Bertie, Carteret, Craven, Cumberland, Harnett, Jones, Northampton, Pender, Pitt, Onslow, Sampson and Swain counties, upon the petition of any three freeholders of a township, shall appoint one or more, not to exceed three, qualified electors of such township as inspectors and measurers of logs and timber in and for the county wherein said township is situate, who shall hold his office until the thirty-first day of the second December next after his appointment and qualification, or until his successor or successors may be qualified, whose duty it shall be upon request of the purchaser or seller of any logs or timber sold within the township

wherein such inspector resides, to measure and inspect the same and to furnish, if requested so to do, the purchaser and seller each with a certificate of the result of such measurement and inspection. Such inspector shall keep in a suitably bound book a record of all logs and timber inspected or measured by him, together with the marks or brands, if any, and the names of the purchaser and seller, the number of feet and the date of such measurement and inspection, which record shall be open to the inspection of the public and preserved and delivered to his successors in office. Such inspector shall, before entering upon the duties of his office, take, subscribe and file with the said board an oath of office, and give bond payable to the state of North Carolina in the sum of five hundred dollars, conditioned for the faithful performance of the duties of his office; such bond to be approved and filed as the bond of other county officers. No inspection or measurement of logs or timber in said counties by any person other than an officer created by this section shall be of any validity or binding force or effect in any sale of logs or timber. The inspector shall be allowed for his services five cents per thousand feet measured or inspected, to be paid one-half by each party to the sale.

1891, c. 142, ss. 1, 2, 3, 4, 5; 1895 (Pr.). c. 229.

CHAPTER 45.

INTEREST.

(Sections 1930—1936.)

1930. Rate of, six per cent. The legal rate of interest shall be six per centum per annum for such time as interest may accrue, and no more.

Code, s. 3385; 1895, c. 69; 1876-7, c. 91.

1931. Penalty for usury; corporate bonds sold below par. The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives

or corporation by whom it has been paid, may recover back twice the amount of interest paid, in an action in the nature of action for debt: Provided, that in any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it shall be lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to-wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest: Provided further, that nothing contained in the foregoing section shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof. This section shall not apply to contracts executed prior to February twenty-first, one thousand eight hundred and ninety-five.

Code, s. 3836; 1895, c. 69; 1903, c. 154; 1876-7, c. 91.

Note. For limitation of actions, see Civil Procedure, s. 358.

For damages against officers for money unlawfully detained, see s. 251.

1932. Time from which it runs. Interest is due and payable on instruments, as follows:

1. Where the instrument provides for the payment of interest without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

2. All bonds, bills, notes, bills of exchange, liquidated and settled accounts, shall bear interest from the time they become due, provided such liquidated and settled accounts be signed by the debtor, unless it be specially expressed that interest is not to accrue until a time mentioned in the said writings or securities.

3. All bills, bonds, or notes payable on demand, shall be held and deemed to be due when demandable by the creditor, and shall bear interest from the time they are demandable, unless otherwise expressed.

4. All securities for the payment or delivery of specific articles shall bear interest as moneyed contracts; and the articles shall be rated by the jury at the time they become due.

5. Bills of exchange which shall be drawn or indorsed in the state, and shall be protested, shall carry interest, not from the date thereof, but from the time of payment therein mentioned.

Code, ss. 44, 45, 46, 47; 1899, c. 733, s. 17. sub-s. 2; R. C., c. 13; 1786, c. 248; 1828, c. 2.

1933. Guardian notes bear compound. Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian,

shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him.

Code s. 1592; R. C., c. 54, s. 23; 1762, c. 69; 1816, c. 925; 1868-9, c. 201, s. 29.

1934. Contracts, except penal bonds and judgments to bear; jury to distinguish principal from. All sums of money due by contract of any kind whatsoever, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it be paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section.

Code, s. 530; R. C., c. 31, s. 90; 1786, c. 253; 1789, c. 314, s. 4; 1807, c. 721.

1935. After verdict or report, computed by clerk. When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered shall be computed by the clerk and added to the costs of the party entitled thereto.

Code, s. 529.

1936. Judgment by default final, clerk ascertains. Whenever a suit shall be instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, and the defendant shall not plead to issue thereon, upon judgment, the clerk of the court shall ascertain the interest due by law, without a writ of inquiry, and the amount shall be included in the final judgment of the court as damages, which judgment shall be rendered therein in the manner prescribed by the preceding section.

Code, s. 531; R. C., c. 31, s. 91; 1797, c. 475.

CHAPTER 46.

JURORS.

| | |
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| I. How selected, | 1937—1943 |
| II. Petit jurors and talesmen, | 1944—1947 |
| III. Grand jurors, | 1948—1952 |
| IV. Special venire, | 1953—1955 |
| V. General provisions, | 1956—1961 |

I. HOW SELECTED.

1937. List made by county commissioners. The board of county commissioners for the several counties at their regular meeting on the first Monday in June, in the year nineteen hundred and five and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of such persons only as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. A list of the names thus selected shall be made out by the clerk of the board of commissioners and shall constitute the jury list, and shall be preserved as such.

1899, c. 729; Code, ss. 1722, 1723; 1897, cc. 117, 539; 1889, c. 559; 1806. c. 694.

1938. Names put in boxes. The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

Code, s. 1726; 1868-9, c. 9, s. 5.

1939. Drawn from box, how. At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1 by a child not more than ten years of age, thirty-six scrolls, except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls, and the persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be

held for the county ensuing such drawing, and for which they are drawn, and the scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service; and the trial jury which has served during each week, shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned.

Code, ss. 1727, 1731; 1889, c. 559; 1897, c. 117; 1868-9, c. 175; 1868-9, c. 9, s. 6; 1806, c. 694; 1901, c. 636; 1901, c. 28, s. 3; 1903, c. 11.

1940. Jurors with suits pending. If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

Code, s. 1728; 1868-9, c. 9, s. 7; 1806, c. 694.

1941. When disqualified persons are drawn. If any of the persons drawn to serve as jurors be dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

Code, s. 1729; 1889, c. 559; 1897, c. 117, s. 5; 1806, c. 694.

1942. How drawing to continue. The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

Code, s. 1730; 1868-9, c. 9, s. 9; 1806, c. 6, s. 94.

1943. When commissioners fail to draw jury. If the commissioners for any cause fail to draw a jury for any term of the superior court, regular or special, the sheriff of the county and the clerk of the commissioners in the presence of, and assisted by two justices of the peace of the county, shall draw such jury in the manner above prescribed; and if a special term shall continue for more than two weeks, then for the weeks exceeding two, a jury or juries may be drawn as in this section provided.

Code, s. 1732; 1868-9, c. 9, s. 11.

II. PETIT JURORS AND TALESMEN.

1944. Peremptory challenges. The clerk, before a jury shall be impaneled to try the issues in any civil suit, shall read over the names of the jury upon the panel in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily four jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court.

Code, s. 406; R. C., c. 31, s. 35; 1796, c. 452, s. 2; 1812, c. 833.

1945. Sworn; judge decides competency. The clerk shall, at the beginning of the court, swear such of the petit jury as are of the original panel, to try all civil cases; and if there should not be enough of the original panel, the talesmen shall be sworn; and the petit jurors of the original panel, as well as talesmen, shall be sworn as prescribed in the chapter entitled Oaths: Provided, that nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any of them; and if by reason of such challenge, any juror shall be withdrawn, his place on the jury shall be supplied by any of the original venire, or from the bystanders qualified to serve as jurors, and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions.

Code, s. 405; R. C., c. 31, s. 34; 1790, c. 321; 1822, c. 1133, s. 1.

1946. Tales jurors summoned; qualifications. That there may not be a defect of jurors, the sheriff shall by order of court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. It shall be a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of the court.

Code, s. 1733; R. C., c. 31, s. 29; 1779, c. 156, ss. 69.

1947. Judge to appoint one to summon tales jurors, sheriff interested. In the trial of any action before a jury where the sheriff of the county in which the case is to be tried is a party to or has any interest in the action, or when the presiding judge shall find upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff.

1889, c. 441.

R. S. Vol. I—37

III. GRAND JURORS.

1948. How drawn. The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

Code, s. 404; R. C., c. 31, s. 33; 1779, c. 157, s. 11.

1949. Not drawn at special term. There shall be no grand jury at any special term, unless the same shall be ordered by the governor.

Code, s. 921; 1868-9, c. 273, s. 9.

1950. Exceptions to, when taken. All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken the same shall be deemed to have been waived.

Code, s. 1741.

1951. Foreman may administer oaths. The foreman of every grand jury duly sworn and impaneled in any of the courts shall have power to administer oaths and affirmations to persons to be examined before it as witnesses: Provided, that the said foreman shall not administer such oath or affirmation to any persons except those whose names are endorsed on the bill of indictment by the officer prosecuting in behalf of the state, or by direction of the court: Provided further, that the foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury.

Code, s. 1742; 1879, c. 12.

1952. Must visit jail and county home. Every grand jury, while the court is in session, shall visit the county home for the aged and infirm, the workhouse, if there is one, and the jail, examine the same, and especially the apartments in which inmates and prisoners shall be confined; and they shall report to the court the condition thereof and of the inmates and prisoners confined therein, and also the manner in which the jailer or superintendent has discharged his duties.

Code, s. 785; R. C., c. 30, s. 3; 1816, c. 911, s. 3.

NOTE. For duty of grand jury in reporting infants without guardian, see s. 1787.

IV. SPECIAL VENIRE.

1953. Ordered; summoned. Whenever a judge of the superior court shall deem it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be, a special writ of venire facias, commanding him to summon such number of the freeholders of said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when the same shall be returnable, with the names of the jurors summoned.

Code, s. 1738; R. C., c. 35, s. 30; 1830, c. 27.

1954. Drawn from box, when. Whenever a judge shall deem a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box No. 1 by a child under ten years of age. And the names so drawn (being freeholders) shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the said sheriff. If the special venire is exhausted before the jury is chosen, the judge in his discretion may order another special venire to be drawn and summoned in like manner as the first, until the jury has been chosen. The scrolls, containing the names of the persons drawn as jurors from box No. 1 shall, after the jury is chosen, be placed in box No. 2; and if box No. 1 is exhausted before the jury is chosen, the drawing shall be completed from box No. 2, after the same shall have been well shaken. In the counties of Durham and Rockingham whenever a special venire is ordered, the jurors shall be drawn as herein provided.

Code, s. 1739; 1897, c. 364.

1955. Penalty on sheriff not executing; on jurors not attending. If any sheriff shall fail duly to execute and return such writ of venire facias, he shall be fined by the court not exceeding one hundred dollars; and all jurors so summoned shall attend until discharged by the court, under the same rules and penalties as are prescribed for other jurors.

Code, s. 1740; R. C., c. 35, s. 31; 1830, c. 27, s. 2.

V. GENERAL PROVISIONS.

1956. Summoned and must attend until discharged. The clerk of the board of county commissioners shall, within five days from the drawing, deliver the list of the jurors drawn for the superior court to the sheriff of the county, who shall summon the persons therein named to attend as jurors at such court, which summons shall be served, personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which he may be summoned; and jurors shall appear and give their attendance until duly discharged.

Code, s. 1733; 1868-9, c. 9, s. 12; R. C., c. 31, s. 29; 1779, c. 157, ss. 4, 6.

1957. Penalty for nonattendance, regular and tales. Every person on the original venire summoned to appear as a juror, who shall fail to give his attendance until duly discharged, shall forfeit and pay for the use of the county the sum of twenty dollars, to be imposed by the court: Provided, that each delinquent juryman shall have until the next succeeding term to make his excuse for his non-attendance, and, if he shall render an excuse deemed sufficient by the court, he shall be discharged without costs. And every person summoned of the bystanders, who shall not appear and serve during the day as a juror, shall be fined in the sum of two dollars, unless he can show sufficient cause to the court; and the clerk shall forthwith issue an execution against the estate of the delinquent tales juror for such amercement and costs.

Code, ss. 173, 405; R. C., c. 31, s. 30; 1779, c. 157, s. 4; 1783, c. 189; 1806, c. 694.

1958. Furnished with accommodations. When any jury, impaneled to try any cause, shall be put in charge of an officer of the court, the said officer shall furnish said jury with such accommodation as the court may order, and the same shall be paid for by the party cast or by the county, under the order and in the discretion of the judge of said court.

Code, s. 1736; 1876-7, c. 173; 1889, c. 44.

1959. Exempt from civil arrest. No sheriff or other officer shall arrest under civil process any juror during his attendance on or going to and returning from any court of record. All such service shall be void, and the defendant on motion shall be discharged.

Code, s. 1735; R. C., c. 31, s. 31; 1779, c. 157, s. 10.

1960. Exemptions from jury duty. No practicing physician, licensed druggist, telegraph operator who is in the regular employ of any telegraph company or railroad company, train dispatcher

who has the actual handling of either freight or passenger trains, regularly licensed pilot, undertaker who is a funeral director, officer or employee of a state hospital for the insane, or active member of a fire company, shall be required to serve as a juror.

Code, ss. 1723, 2269; 1901, c. 118; 1897, c. 32; 1889, c. 255; 1885, c. 289.

1961. Clerk to keep record of jurors. The clerk of the superior court shall record alphabetically in a book kept for the purpose the names of all grand and petit jurors and talesmen who shall serve in his court, with the term at which they serve.

1893, c. 52, s. 3.

NOTE. See Clerk Superior Court.

NOTE. For compensation of jurors, see Salaries and Fees.

For list of guardians furnished grand jury, see Guardian, s. 1787.

For reports of justices of the peace furnished grand jury, see Courts—Justices'.

For arguments to jury, see Attorneys, s. 214.

For jurors in justices' courts, see Courts—Justices'.

For province of, in divorce, see Divorce and Alimony.

For right of trial by jury, see ss. 488, 493, 1985.

For waiver of trial by jury, see s. 500.

For verdicts by jurors, see ss. 510, 513.

CHAPTER 47.

LANDLORD AND TENANT.

| | Sections. |
|-----------------------------|-----------|
| I. The relation, | 1962—1965 |
| II. The lessor, | 1966—1969 |
| III. The lessee, | 1970—1972 |
| IV. Agricultural tenancies, | 1973—1980 |
| V. Summary ejectment, | 1981—1990 |
| VI. Forms, | 1991 |

I. THE RELATION.

1962. Lessors and lessees, not partners. No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee.

Code, s. 1744; 1868-9, c. 156, s. 3.

1963. Forfeiture without demand for rent, when. Whenever any half year's rent or more shall be in arrear from any tenant to

his landlord, and the landlord has a subsisting right to re-enter for the nonpayment of such rent, he may bring an action for the recovery of the demised premises, and the service of the summons therein shall be deemed equivalent to a demand of the rent in arrear and a re-entry on the demised premises, and if, on the trial of the cause, it shall appear that the landlord had a right to re-enter the plaintiff shall have judgment to recover the demised premises and his costs.

Code, 1745; 1868-9, c. 156, s. 156.

1964. Length of notice to quit. A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days.

Code, s. 1750; 1891, c. 227; 1868-9, c. 156, s. 9.

1965. Agreement to repair, how construed. An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one-half its value, by accidental fire not occurring from the want of ordinary diligence on his part.

Code, s. 1752; 1868-9, c. 156, s. 11.

II. THE LESSOR.

1966. Recovers for use, when. Whenever any person shall occupy land of another by the permission of such other, without any express agreement for rent, or upon a parol lease which is void, the landlord may recover a reasonable compensation for such occupation, and if by such parol lease a certain rent was reserved, such reservation may be received as evidence of the value of the occupation.

Code, s. 1746; 1868-9, c. 156, s. 5.

1967. Rent apportioned, estate terminated. If a lease of land, in which rent is reserved, payable at the end of the year or other certain period of time, be determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death, proportionate to the part of the period elapsed before the death, subject to all just allowances; and if any security shall have been given for such rent it shall be apportioned in like manner.

Code, s. 1747; 1868-9, c. 156, s. 6.

1968. Rents and charges apportioned to successive owners.

In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right shall so terminate during a period in which a payment is growing due, the payment becoming due next after such terminating event, shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event.

Code, s. 1748; 1868-9, c. 156, s. 7.

1969. Grantees of reversion, same rights and liabilities as grantors. The grantee in every conveyance of reversion in lands, tenements or hereditaments, shall have the like advantages and remedies by action or entry against the holders of particular estates in such real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, shall have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs.

Code, s. 1765; 32 Hen. VIII., c. 34; 1868-9, c. 156, s. 18.

III. THE LESSEE.

1970. Holds to end of farming year. Where any lease for years of any land let for farming on which a rent is reserved shall determine during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor, to the giving up such possession, and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession.

Code, s. 1749; 1868-9, c. 156, s. 8.

1971. Not liable for accidental damage. A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part; unless he so contract.

Code, s. 1751; 1868-9, c. 156, s. 10.

1972. May surrender, building destroyed or damaged. If a demised house, or other building, be destroyed during the term, or so much damaged that it can not be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage occur without negligence on the part of the lessee or his agents or servants, and there be in the lease no agreement respecting repairs, or providing for such a ease, and the use of the house damaged was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damage, and by paying or tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage, proportionate to the time between the last period of payment and the occurrence of the damage, and the lessee shall be thenceforth discharged from all rent accruing afterwards; but not from any other agreement in the lease. This section shall not apply if a contrary intention appear from the lease.

Code, s. 1753; 1868-9, c. 156, s. 12.

IV. AGRICULTURAL TENANCIES.

1973. Landlord's lien, crop vested in to secure, how enforced. When lands shall be rented or leased by agreement, written or oral, for agricultural purposes, or shall be cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands shall be paid and until all the stipulations contained in the lease or agreement shall be performed, or damages in lieu thereof shall be paid to the lessor or his assigns, and until said party or his assigns shall be paid for all advancements made and expenses incurred in making and saving said crops. This lien shall be preferred to all other liens, and the lessor or his assigns shall be entitled, against the lessee or cropper or the assigns of either who shall remove the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the

remedies given in an action upon a claim for the delivery of personal property.

Code, s. 1754; 1876-7, c. 283.

1974. Rights of tenant. Whenever the lessor or his assigns shall get the actual possession of the crop or any part thereof otherwise than by the mode prescribed in the preceding section, and said lessor or his assigns shall refuse or neglect, upon a notice, written or oral, of five days, given by the lessee or cropper or the assigns of either, to make a fair division of said crop, or to pay over to such lessee or cropper or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then and in that case the lessee or cropper or the assigns of either shall be entitled against the lessor or his assigns to the remedies given in an action upon a claim for the delivery of personal property to recover such part of the crop as he, in law and according to the lease or agreement, may be entitled to. The amount or quantity of such crop claimed by said lessee or cropper or the assigns of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action.

Code, s. 1755; 1876-7, c. 283, s. 2.

1975. Action on the contract; tenant's undertaking. Where any controversy shall arise between the parties, and neither party avails himself of the provisions of this chapter, it shall be competent for either party to proceed at once to have the matter determined in the court of a justice of the peace, if the amount claimed be two hundred dollars or less, and in the superior court of the county where the property is situate if the amount so claimed shall be more than two hundred dollars. But in case there shall be a continuance or an appeal from the justice's decision to the superior court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action.

Code, s. 1756; 1876-7, c. 283, s. 3.

1976. Crops delivered to landlord; undertaking. In case the lessee or cropper, or the assigns of either, shall, at the time of the appeal or continuance mentioned in the preceding section, fail to give the undertaking therein required, then the constable or other lawful offi-

cer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in the preceding section, conditioned for the forthcoming of such property, or the value thereof, in case judgment shall be pronounced against him.

Code, s. 1757; 1876-7, c. 283, s. 4.

1977. If neither gives undertaking, crops sold. If neither party gives the undertaking described in the two preceding sections, it shall be the duty of the justice of the peace or the clerk of the superior court, to issue an order to the constable or sheriff, or other lawful officer, directing him to take into his possession all of said property, or so much thereof as shall be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties.

Code, s. 1758; 1876-7, c. 283, s. 5.

1978. Tenant's crop not subject to execution against landlord. Whenever servants and laborers in agriculture shall by their contracts orally or in writing be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated.

Code, s. 1796.

1979. Turpentine and lightwood leases. This chapter shall apply to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar, and the parties thereto shall be fully subject to the provisions and penalties of this chapter.

Code, s. 1762; 1893, c. 517; 1876-7, c. 283, s. 7.

1980. Mining and timber land leases. If in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent shall be reserved, and if it shall be agreed in the lease that the minerals, timber or goods, or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this chapter.

Code, s. 1763; 1868-9, c. 156, s. 16.

V. SUMMARY EJECTMENT.

1981. Tenant dispossessed, when. Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who shall hold over and continue in

the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in either of the following cases:

1. Whenever a tenant in possession of real estate holds over after his term has expired.

2. When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

3. When any tenant or lessee of lands or tenements, being in arrear for rent, or having agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who shall have given to the lessor a lien on such crop as a security for the rent, shall desert the demised premises, and leave them unoccupied and uncultivated.

Code, ss. 1766, 1777; 4 Geo. II., c. 28; 1868-9, c. 156, s. 19.

1982. Summons issues by justice on verified complaint. When the lessor or his assigns, or his or their agent or attorney, shall make oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases above described, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney, to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he shall omit to make such claim, he shall not be thereby prejudiced in any other action for their recovery.

Code, s. 1767; 1868-9, c. 156, s. 20; 1869-70, c. 212.

1983. Service of summons. The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant have no usual place of residence in the county and can not be found therein, by fixing a copy on some conspicuous part of the premises claimed.

Code, s. 1768; 1868-9, c. 156, s. 21.

1984. Judgment by default or confession. The summons shall be returned according to its tenor, and if on its return it shall

appear to have been duly served, and if the defendant shall fail to appear or shall admit the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be.

Code, s. 1769, c. 156, s. 22.

1985. Trial by justice; jury trial; judgment; execution. If the defendant by his answer shall deny any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party shall demand a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury shall find that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury and for costs; and shall issue his execution to carry the judgment into effect.

Code, s. 1770; 1868-9, c. 156, s. 23.

1986. Damages assessed to time of trial. On appeal to the superior court, the jury trying the issue joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court, and judgment for the rent in arrear and for the damages assessed may, on motion, be rendered against the sureties to the appeal.

Code, s. 1775; 1868-9, c. 156, s. 28.

1987. Rent and cost tendered by tenant. If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, shall pay or tender the rent due and the costs of the action, all further proceedings in such action shall cease; or if the plaintiff shall further prosecute his action, and the defendant shall pay into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed.

Code, s. 1773; 4 Geo. II., c. 28, s. 4; 1868-9, c. 156, s. 26.

1988. Appeal; undertaking on; increase of. Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant shall have given an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant shall pay any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant shall fail to show proper cause and shall not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed.

Code, s. 1772; 1868-9, c. 156, s. 25; 1883, c. 316.

1989. Restitution, when. If the proceedings before the justice shall be brought before a superior court and quashed, or judgment be given against the plaintiff, the superior or other court in which final judgment shall be given, shall, if necessary, restore the defendant to the possession, and issue such writs as shall be proper for that purpose.

Code, s. 1774; 1868-9, c. 156, s. 27.

1990. Damages to tenant for wrongful removal. If, by order of the justice, the plaintiff shall be put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal.

Code, s. 1776; 1868-9, c. 156, s. 30.

VI. FORMS.

1991. Forms sufficient. The following forms, or substantially similar, shall be sufficient in all proceedings under this chapter:

OATH OF PLAINTIFF.

North Carolina, County.

A. B., plaintiff,
against
C. D., defendant. } Summary proceedings in ejectment.

The plaintiff (his agent or attorney) maketh oath that the defendant entered into the possession of a piece of land in said county (describe the land) as a lessee of the plaintiff (or as lessee of E. F., who, after the making of the lease, assigned his estate to the plaintiff, or otherwise, as the fact may be); that the term of the defendant expired on the....day of.....19.... (or that his estate has ceased by nonpayment of rent, or otherwise, as the fact may be); that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it, but holds over; that the estate of the plaintiff is still subsisting, and the plaintiff asks to be put in possession of the premises.

The plaintiff claims.....dollars for rent of the premises from the....day of.....19.... to the....day of.....19...., and also.....dollars for the occupation of the premises since the....day of.....19.... to the date hereof.

A. B., plaintiff.

Subscribed and sworn to before me, this....day of.....19....

J. K., J. P.

SUMMONS.

North Carolina, County.

A. B., plaintiff,
against
C. D., defendant. } Summary proceedings in ejectment.

A. B. (his agent or attorney) having made and subscribed before me the oath, a copy of which is annexed, you are required to appear before me on the day of 19., at, then and there to answer the complaint; otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal this....day of....., 19....

J. K., J. P. (Seal).

To C. D., defendant.

The justice attaches the oath of the plaintiff to the summons and delivers them, and a copy of both of them, to the officer, and makes the following entry on his docket, or varies it according to the facts.

DOCKET ENTRIES.

A. B., plaintiff,
against
C. D., defendant. } Summary proceedings in ejectment for (describe the premises).

Oath of plaintiff (his agent or attorney) filed on the....day of..... 19....

Plaintiff claims.....dollars for rent from.....to....., and.....dollars for occupation from.....to.....

Summons issued the....day of....., 19...., to....., constable (or sheriff, as the case may be).

The officer serves the summons and returns it to the justice with the oath of the plaintiff, and with his return indorsed:

RETURN OF OFFICER.

On this day I served the within summons on the defendant, C. D., by delivering him a copy thereof, and of the oath of A. B., annexed (or by leaving a copy thereof and the oath of A. B. at the usual place of residence of the defendant C. D., with an adult found there) (or the said C. D. not being found in my county, and having no usual or last place of residence therein) (or no adult person being found at his usual or last place of residence, by posting a copy of the summons and of the oath of A. B., annexed, on a conspicuous part of the premises claimed).

N. M., Constable.

The....day of....., 19....

RECORD TO BE ENTERED ON DOCKET.

A. B., plaintiff, }
 against }
C. D., defendant. } Summary proceedings in ejectment.

It appearing that the summons, with a copy of the oath of the plaintiff (his agent or attorney), was duly served on defendant,* and whereas, the defendant fails to appear (or admits the allegations of the plaintiff), I adjudge that the defendant be removed from and the plaintiff put in possession of the premises described in the oath of the plaintiff. I also adjudge that the plaintiff recover of defendant.....dollars for rent from the.....day of.....19.... to the.....day of....., 19...., and.....dollars for damages for occupation of the premises from the day of , 19...., to this day, and.....dollars for his costs; the.....day of.....19....

If the defendant admit part of the allegations of plaintiff, but not all, the judgment must be varied accordingly; for example: follow the foregoing to the asterisk (*), and then proceed:

And whereas the defendant appears and admits the first and second allegations of the plaintiff, and denies the residue; and whereas, both parties waived a trial by jury; I heard evidence upon the matters in issue, and find (here state the findings on the matters in issue separately).

Supposing the findings are for the plaintiff, the record would proceed:

I therefore adjudge that the defendant (and so on from the asterisk (*)).

If either party shall demand a jury the record will proceed from the asterisk (*), as follows:

And whereas, the plaintiff (or defendant, as the case may be) demanded a trial of the issues joined by a jury, I caused a jury to be summoned, to-wit: (here give the names of the jurors summoned) from whom the following jury was duly impaneled, to-wit: (here state the names of the six jurors impaneled), who find (here state the verdict of jury; if they find all the issues for the plaintiff, say so; if any particular issues, say so; also state the sums assessed by them for rent and for occupation to trial). Therefore, I adjudge, etc. (as in form No. 5. from asterisk (*)).

If either party appeals, the justice will enter on his docket as follows, altering the entry according to the facts:

RECORD OF APPEAL.

From the foregoing judgment the plaintiff (or defendant, as the case may be) prayed an appeal to the next superior court of said county, which is allowed.

EXECUTION ON JUDGMENT FOR PLAINTIFF.

A. B., plaintiff, }
 against }County.
 C. D., defendant. }

The State of North Carolina, to any lawful officer of said county—Greeting:

You are hereby commanded to remove C. D. from, and put A. B. in, the possession of a certain piece of land (here describe it as in the oath of plaintiff). You shall also make out the goods and chattels, lands and tenements, of said defendantdollars, with interest from theday of, 19... to the day of payment, which the plaintiff lately recovered of the defendant as rent and damages, and the further sum ofdollars as costs, in said action. Return this writ, with a statement of your proceedings thereon, before me (state when and where according to general law respecting justices' executions).

Witness my hand and seal, thisday of, 19....

..... (Seal.)

BOND TO STAY EXECUTION.

We, the undersigned,and, acknowledge ourselves indebted toin the sum ofdollars:

Witness our hands and seals, this theday of, A. D. 19....

Whereas on theday of, A. D. 19..., before, a justice of the peace forcounty, A. B. recovered a judgment against C. D. forand fordollars damages for the detention of said real estate from theday of, A. D. 19..., to theday of, A. D. 19...; and whereas, the saidha... prayed an appeal to the superior court from said judgment, and also asks that execution on said judgment shall be suspended: Now, therefore, if the said shall pay any judgment, which, in this or in any other action, the saidmay recover for the rent of said premises, and for damages for detention thereof, then this obligation shall be void, otherwise to remain in full force and virtue.

..... (Seal.)

..... (Seal.)

..... (Seal.)

STAY OF EXECUTION.

The State of North Carolina, to any officer having an execution in favor of A. B., plaintiff, v. C. D., defendant, in a summary proceeding in ejectment, signed by, a justice of the peace.

The defendant having given bond to me, as required by law, on his appeal to the superior court ofcounty, in the above case, you will stay further proceedings upon said execution and immediately return the same to me, with a statement of your action under it.

Witness my hand and seal thisday of, 19....

....., J. P. (Seal.)

CERTIFICATE ON RETURN OF APPEAL.

The annexed are the original oath, summons and other papers, and a copy of the record of the proceedings in the case of a summary proceeding in ejectment, A. B., plaintiff, v. C. D., defendant.

....., J. P. (Seal.)

(Here state all the costs, to whom paid or due, and by whom.)

(All the papers must be attached.)

Code, s. 1780.

NOTE. For conveyance of rent without attornment, see s. 900.

For penalty for removing crop without payment of rent, see Crimes.

For penalty for unlawful seizure of crops by landlord, see Crimes.

For penalty upon tenant for surrendering possession to one not landlord, see Crimes.

For injury to property by tenant, see Crimes.

For requirement of leases in writing, see s. 929.

For proceedings before justices, see Courts—Justices'.

For jury trial in summary ejectment, see Courts—Justices'.

For costs, see Costs.

CHAPTER 48.

LIBEL AND SLANDER.

(Sections 1992—1995.)

1992. Notice to newspaper before action. Before any action, either civil or criminal, shall be brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant specifying the article and the statements therein which he alleges to be false and defamatory.

1901, c. 557.

1993. Good faith and correction, actual damages recovered; nominal fine. If it shall appear upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" shall be rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more.

1901, c. 557.

1994. Anonymous communications. This chapter shall not apply to anonymous communications and publications.

1901, c. 557, s. 3.

1995. Slander of women. Whereas, doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable.

Code, s. 3763; R. C., c. 106; 1808, c. 478.

NOTE. For penalty for furnishing false news, see Crimes.

For pleading in actions for libel, see ss. 462, 463.

For statute of limitations, see Civil Procedure, ss. 359, 360.

For pleadings in, see Civil Procedure, ss. 462, 463.

For indictment for slander of women, see Crimes.

For recovery of costs, see Costs.

CHAPTER 49.

LIENS.

| | Sections. |
|-----------------------------|-----------|
| I. Labor and materials, | 1996—1998 |
| II. Subcontractors, | 1999—2003 |
| III. On colts and calves, | 2004—2005 |
| IV. Proceedings to enforce. | 2006—2011 |
| V. Rights of defendant, | 2012—2013 |
| VI. Priorities, | 2014—2016 |
| VII. Hotels, | 2017—2019 |
| VIII. On vessels, | 2020—2031 |
| IX. Agricultural liens, | 2032—2037 |

I. LABOR AND MATERIALS.

1996. On buildings and other property. Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building may be situated; and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished. This section shall apply to the property of married women when it shall appear that such building was built or repaired on her land with her consent or procurement, and in such case she shall be deemed to have contracted for such improvements.

Code, s. 1781; 1901, c. 617; 1869-70, c. 206, s. 1.

1997. Personal property repaired. Any mechanic or artisan who shall make, alter or repair any article of personal property at the request of the owner or legal possessor of such property, shall have a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges shall be paid; and if not paid for within the space of thirty days, provided it does not exceed fifty dollars, if over fifty dollars ninety days, after the work shall have been done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, by giving two weeks' public notice of such sale by advertising in some newspaper in the county in which the work may have been done, or if there be no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work may have been done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof.

Code, s. 1783; 1869-70, c. 206, s. 3.

1998. Constructing railroad; claims collected; time for action.

As often as any contractor for the construction of any part of a railroad which is in progress of construction shall be indebted to any laborer for thirty or less number of days' labor performed in constructing said road, such laborer may give notice of such indebtedness to said company in the manner herein provided, and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days' labor for which the claim is made. Such notice shall be in writing, and shall state the amount and number of days' labor, and the time when the labor was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer, or his attorney, and shall be served on an engineer, agent or superintendent employed by said company having charge of the section of the road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such engineer, agent or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section, unless the same is commenced within thirty days after notice is given to the company by such laborer as above provided.

Code, s. 1942; 1871-2, c. 138, s. 12.

Note. See s. 2001.

II. SUBCONTRACTORS.

1999. Given preferred lien. All subcontractors and laborers who are employed to furnish or who do furnish material for the building, repairing or altering any house or other improvement on real estate, shall have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanics' lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as provided for other liens in this chapter, except where it is otherwise provided: Provided, that the sum total of all the liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice given.

Code, ss. 1801, 1803; 1880, c. 44, ss. 1, 3.

2000. Notice to owner; liability of. Any subcontractor, laborer or material man, who claims a lien as provided in the preceding section, may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement at any time before the settlement with the contractor, and if the said owner or lessee shall refuse or neglect to retain out of the amount due the said contractor under the contract as much as shall be due or claimed by the subcontractor, laborer or material man, the subcontractor, laborer or material man may proceed to enforce his lien, and after such notice is given, no payment to the contractor shall be a credit on or discharge of the lien herein provided.

Code, s. 1802; 1880, c. 44, s. 2.

2001. Contractor shall furnish owner with statement of indebtedness; subcontractor may. Whenever any contractor, architect or other person shall make a contract for building, altering or repairing any building or vessel, or for the construction or repair of a railroad, with the owner thereof, it shall be his duty to furnish to the owner or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it shall be the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing materials. The owner may retain in his hands until the contract is completed, such sum as may have been agreed on between him and the contractor,

architect or other person employing laborers, as a guaranty for the faithful performance of the contract by such contractor. When such contract has been performed by the contractor, such fund reserved as a guaranty shall be liable to the payment of the sum due the laborer, mechanic or artisan for labor done, or the person furnishing the materials as hereinbefore provided. Any laborer, mechanic, artisan or person furnishing materials may furnish to such owner or his agents before he shall have paid the contractor an itemized statement of the amount owing to such laborer, mechanic or artisan employed by said contractor, architect or other person for work or labor on such building, vessel or railroad, and any person may furnish to such owner or his agents an itemized statement of the amount due him for materials furnished for such purposes; and upon the delivery of such notice to such owner or his agent the person giving such notice shall be entitled to all the liens and benefits conferred by this section or by any other law of this state in as full and ample a manner as though the statement had been furnished by the contractor, architect or such other person.

1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478.

2002. Sums due by statement, a lien. The sums due to the laborer, mechanic or artisan for labor done, or due the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the superior court.

1887, c. 67, s. 2.

2003. Claims paid pro rata, when. In the event the amount due the contractor by the owner shall be insufficient to pay in full the laborer, mechanic or artisan, for his labor, and the person furnishing materials for materials furnished, it shall be the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner.

1887, c. 67, s. 3.

III. ON COLTS AND CALVES.

2004. Season of sire a lien on. In all cases where the owner, or any agent for or employee of the owner, of any mare, jennet or cow shall turn the same to a stud-horse, jack or bull for the purpose of raising colts or calves, the price charged for the season of the stud-horse, jack or bull shall constitute a lien on the colt or calf until the price so charged for the season is paid.

Code, s. 1797; 1885, c. 72; 1887, c. 14; 1872-3, c. 94, s. 1.

2005. Not exempt from execution. The colt or calf shall not be exempt from execution for the payment of said season price by reason of the operation of the personal property exemption: Provided, that the person claiming such lien shall institute action to enforce the same within twelve months from the foaling of the colt or dropping the calf.

Code, s. 1798; 1885, c. 72; 1872-3, c. 94, s. 2; 1879, c. 47.

IV. PROCEEDINGS TO ENFORCE.

2006. Claims filed, when. All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; if over two hundred dollars or against any real estate or interest therein, in the office of the superior court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished.

Code, s. 1784; 1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1.

Note. For duty of clerk, records, etc., see Clerk Superior Court.

For clerk's fee, see Salaries and Fees.

2007. Action brought, when and where. Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien: Provided, that if the debt be not due within six months but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due.

Code, ss. 1785, 1790; 1868-9, c. 117, s. 7; 1869-70, c. 206, s. 5; 1876-7, c. 250; 1876-7, c. 251.

2008. Filed in twelve months. Notice of lien shall be filed, as hereinbefore provided, at any time within twelve months after the completion of the labor, or the final furnishing the materials, or the gathering of the crops.

Code, s. 1789; 1868-9, c. 117, s. 4; 1876-7, c. 53, s. 2; 1881, c. 65; 1883, c. 101.

2009. Execution. Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest

which the owner had in the premises or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant.

Code, s. 1791; 1868-9, c. 117, s. 9.

Note. For forms of execution, see s. 585.

2010. No justice's execution against land. No execution issued by a justice of the peace, under this chapter, shall be enforced against real estate or any interest therein, but justices' judgments may be docketed on the judgment docket of superior court for the purpose of selling such estate or any interest there.

Code, s. 1794; 1868-9, c. 117, s. 13.

2011. Attachment, remedy, when. In all cases where the owner or employer attempts to remove the crop, houses or appurtenances from the premises, without the permission, or with the intent to defraud the lienee of his lien, the claimant may have a remedy by attachment.

Code, s. 1795; 1868-9, c. 117, s. 14.

V. RIGHTS OF DEFENDANT.

2012. Setoff and counterclaim. The defendant in any suit to enforce the lien shall be entitled to any setoff arising between the contractors during the performance of the contract, or counterclaim allowed by law.

Code, s. 1788; 1869-70, c. 206, s. 8.

2013. How liens discharged. All liens created by this chapter may be discharged as follows:

1. By filing with the justice or clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.

2. By depositing with the justice or clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.

3. By an entry in the lien docket that the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.

4. By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed.

Code, s. 1793; 1868-9, c. 117, s. 12.

VI. PRIORITIES.

2014. Laborer's lien on crops. The lien for work on crops given by this chapter shall be preferred to every other lien or incumbrance which attached to the crops subsequent to the time at which the work was commenced.

Code, s. 1782; 1869-70, c. 206, s. 2.

2015. Date from notice of lien. The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the justice or the clerk.

Code, s. 1792; 1868-9, c. 117, s. 11.

2016. Rights not affected. Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which priority of claim is filed with the proper officer.

Code, s. 1786; 1869-70, c. 206, s. 6.

VII. HOTELS.

2017. May retain baggage, when; lien on. Every hotel and boarding-house keeper who shall furnish board, bed or room to any person shall have the right to retain possession of and a lien upon all baggage or other property of such person that may have been brought to such hotel or boarding-house until all reasonable charges for such room, bed and board are paid.

1899, c. 645, s. 1.

2018. Baggage sold, when. If such charges are not paid within ten days after they become due then the hotel or boarding-house keeper is authorized to sell said baggage or other property at the courthouse door, after first advertising such sale for ten days at said courthouse door and three other public places in the county, and out of the proceeds of sale to pay the costs and expenses of sale and all costs and charges due for said board, bed or room, and the surplus, if any, pay to the owner of said baggage or other property.

1899, c. 645, s. 2.

2019. Notice of sale. Written notice of such sale shall be served on the owner of such baggage or other property ten days before such sale, if he be a resident of the state, but if he be a nonresident of the state, or if his residence be unknown, the publication of such notice for ten days at the courthouse door and three other public places in the county shall be sufficient service of the same.

1887, c. 645, s. 3.

VIII. ON VESSELS.

2020. For towage. Every vessel, boat, scow, lighter, flat, raft or other water craft, shall be subject to a lien for the payment of towage done by any steamboat or tug boat, to be filed and enforced as is provided for other liens.

1893, c. 357.

2021. For labor in loading and unloading. Every vessel, her tackle, apparel and furniture shall be subject to a lien for all labor done by contractors or others in loading or discharging the cargo of such vessel, and also for all labor done by any subcontractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel.

Code, s. 1804; 1881, c. 356, s. 1.

2022. How filed; notice to master. The liens provided for in the preceding section shall be filed as is provided for other liens. The subcontractor or laborer may give notice to the master, agent or owner of such vessel, that the contractor or stevedore is or will become indebted to him, when it shall be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract, as much as shall be due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided.

Code, s. 1805; 1881, c. 356, s. 2.

2023. How enforced. The enforcement of such lien shall be by summons against the contractor or stevedore, and also against the master, agent or owner of such vessel, who made the contract with such contractor or stevedore, if over two hundred dollars, to be issued by the clerk of the superior court, and if under two hundred dollars, by a justice of the peace.

Code, s. 1806; 1881, c. 356, s. 3.

2024. Judgment against contractor, a judgment against master and vessel. The judgment against the contractor or stevedore shall also be a judgment against the master, agent or owner of such vessel, and also against such vessel itself, her tackle, apparel and furniture, which shall be seized, held and sold under execution for the satisfaction of such judgment.

Code, s. 1807; 1881, c. 356, s. 4.

2025. Liens not to exceed amount due contractor. The sum total of all the liens due to different subcontractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to such contractor or stevedore at the time of notice given to such owner, agent or master, or the amount due to such contractor or stevedore at the time of the service of summons upon such master, agent or owner when no notice has been given.

Code, s. 1808; 1881, c. 356, s. 5.

2026. Owner to see laborers paid. In all cases where steamships or vessels of any kind are loaded or unloaded or where any work is done in or about the same by the contractors to do the same known as stevedores or "boss stevedores," who in doing the same shall employ laborers to assist or do the work by the hour, day, week or month, it shall be the duty of the owner or agent of the vessel to see that the laborers employed in or about the same by the stevedore, contractor or "boss stevedore" are fully paid the wages that may be due such laborer before he shall make final settlement with the contractor, stevedore or "boss stevedore."

1887, c. 145, s. 1.

2027. May refuse settlement with contractor till laborers paid. Any owner or agent referred to in the preceding section shall have power to refuse final settlement with the "boss stevedore" or contractor until he or they shall satisfy the said owner or agent, by written oath if necessary, that the same has been done.

1887, c. 145, s. 2.

2028. Owner may pay orders for wages. It shall be lawful for the owner or agent of such vessel to pay off from time to time such orders for wages as may be due and given therefor in favor of the laborers by the contractor or stevedore, which on final settlement may be deducted from the contract price.

1887, c. 145, s. 3.

2029. Laborers may sue owner, when. Any owner or agent of such vessel who shall neglect or refuse to comply with the preceding provisions shall be liable to such laborer in a civil action for the amount of the wages so due him by the contractor, stevedore or "boss stevedore."

1887, c. 145, s. 4.

2030. Contractors for loading vessels licensed. No person shall engage in the business of loading or unloading vessels upon contract, nor shall any person solicit or make any contract for himself or for any other person to load or unload any vessel either by day's work or

by the job, without having previously obtained a license therefor, in the manner provided by law for other licenses for trades and occupations.

1891, c. 450; 1899, c. 595.

2031. Tax and bond. Before the sheriff shall issue the said license the applicant shall pay to the sheriff an annual tax of fifty dollars, and shall execute a bond with two or more approved sureties in the sum of two thousand dollars, payable to the state of North Carolina, and conditioned for the faithful performance of his duties and the due and lawful payment of all sums due to laborers assisting in the work of loading or unloading any vessels upon which the applicant may be engaged. And every bond so taken shall be renewed annually, and shall be filed with and preserved by the register of deeds in trust for every person that shall be injured by the breach of his contracts, who may severally bring suit thereon for the damages by each one sustained.

1891, c. 450.

IX. AGRICULTURAL LIENS.

2032. On crops for advances. If any person shall make any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person so making such advance shall be entitled to a lien on the crops which may be made during the year upon the land in the cultivation of which the advance so made have been expended, in preference to all other liens existing or otherwise, except the laborer's and landlord's liens, to the extent of such advance: Provided, an agreement in writing shall be entered into before any such advance is made to this effect, in which shall be specified the amount to be advanced, or in which a limit shall be fixed beyond which the advance, if made from time to time during the year, shall not go; which agreement shall be registered in the office of the register of the county in which the person to whom the advance is made resides, within thirty days after its date.

Code, s. 1799; 1893, c. 9; 1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1.

2033. Lien created by mortgagors in possession. The preceding section shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustors who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not.

1889, c. 476.

2034. Crops seized and sold, when; issue made up for trial.

If the person making such advances shall make an affidavit before the clerk of the superior court of the county in which such crops are, that the amount secured by said lien for such advances, or any part thereof, is due and unpaid, that the person to whom such advances have been made, or any other person having the said crop in his possession, is about to sell or dispose of his crop, or in any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due, it shall be lawful for him to issue his warrant, directed to any of the sheriffs of this state, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due: Provided, that if the person to whom such advances have been made, or any person claiming an interest in the crops, shall, within thirty days after such sale has been made, give notice in writing to the sheriff, accompanied with an affidavit to this effect, that the amount claimed is not justly due, then it shall be the duty of the said sheriff to hold the proceeds of such sale subject to the decision of the court, upon an issue which shall be made up and set down for trial at the next succeeding term of the superior court for the county in which the person to whom such advances have been made resides: Provided further, that the lien provided in this and the preceding sections shall not affect the rights of landlords or laborers.

Code, s. 1800; 1893, c. 9; 1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88.

2035. Short form in certain counties. For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced and also to constitute a valid chattel mortgage as additional security thereto, and to secure a pre-existing debt, the following form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Carteret, Caswell, Catawba, Chowan, Columbus, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Granville, Greene, Halifax, Harnett, Hyde, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Onslow, Pender, Perquimans, Pamlico, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Transylvania, Tyrrell, Vance, Watauga, Washington, Wayne and Wilson:

North Carolina, County.

Whereas, ha.... agreed to make advances to
for the purpose of enabling said.....to cultivate the lands herein-
after described during the year 19....., the amount of said advances not to
exceed.....dollars; and,

Whereas, said is indebted to said in the further sum of dollars now due; now, therefore, in order to secure the payment of the same the said do.... hereby convey to said all the crops of every description which may be raised during the year 19.... on the following lands in.....County, North Carolina, Township, adjoining the lands of....., and also the following other property, viz.:.....

And if by the.....day of....., 19...., said..... fail.... to pay said indebtedness, then said may foreclose this lien as provided in section two thousand and thirty-four or otherwise, and may sell said crops and other property after ten days' notice posted at the court-house door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this conveyance, and pay the surplus to said....., and the said..... hereby represents that said crops and other property are the absolute property of.....and free from incumbrance..... Witness, hand....and seal, this the.....day of....., 19....

Witness:

....., owner of the lands described in the foregoing instrument, in consideration of the advances to be made, as therein provided, do.... hereby agree to waive and release my lien as landlord upon said crops to the extent of said advances made to said

This the....day of.....19....

Witness: (Seal).

North Carolina, County.

The due execution of the foregoing instrument was this day proven before me by the oath and examination of....., the subscribing witness thereto.

This the....day of.....19....

..... (Seal).

North Carolina, County.

The foregoing certificate of....., a of County, is adjudged to be correct. Let the instrument with the certificate be registered.

This the....day of.....19....

.....
Clerk Superior Court

1899, ee. 17, 247; 1901, ee. 329, 704; 1903, e. 489.

2036. Rights on failure to cultivate crops. If any person in the counties mentioned in the preceding section, after executing a lien as aforesaid for advances, shall fail to cultivate the lands described therein, or shall do any other act calculated to impair the security therein given, then the person to whom the lien was executed shall be relieved from any further obligation to furnish supplies, and the debts and advances theretofore made shall become due and collectible at once, and the person to whom the instrument was executed may proceed to take possession of, cultivate and harvest said crops, and to sell the other property described therein. It shall not be necessary to incorporate such power in the instrument, but this section shall be sufficient authority for the same: Provided, that the sale of any property described in any instrument executed under the provisions of this chapter may be made at any place in the

county where such property is situated after ten days' notice published at the courthouse door and three other public places in said county.

1899, c. 17, s. 3; 1901, c. 329, s. 3.

2037. Commissioners to furnish blank records. The board of commissioners of the said counties shall have record books made with the aforesaid forms printed therein, and the cost of said books and of the printing of said forms, and of such other said books as may be hereafter required, shall be paid by the respective counties, and furnished to the register of deeds.

1899, c. 17, s. 4; 1901, c. 329, s. 4.

NOTE. For fees for probating and registering lien bonds, see Salaries and Fees. For laborer's lien on corporate assets, see Corporations, s. 1079.

For costs in actions, see Costs.

For power to take crops, see Claim and Delivery.

For landlord's lien, see Landlord and Tenant, s. 1973.

For lien of docketed judgment, see s. 534.

For lien of docketed judgments of justices of the peace, see Courts—Justices.

For lien upon land for improvements made, see s. 616.

Debts which are liens on decedent's property paid by administrator, see s. 86.

CHAPTER 50.

LIQUORS.

| | Sections. |
|------------------------------|-----------|
| I. Manufacture, | 2038—2039 |
| II. License, | 2040—2046 |
| III. Local option elections, | 2047—2051 |
| IV. Dispensaries, | 2052—2057 |
| V. Special acts, | 2058—2059 |

I. MANUFACTURE.

2038. Place. No person shall manufacture any spirituous, vinous or malt liquors, or intoxicating bitters, except in incorporated towns and cities, in which the manufacture of such liquors is not forbidden by law, or as hereinafter allowed.

1903, c. 233, s. 1.

2039. Wine or cider from fruits. The manufacture of wine or cider from grapes, berries, or other fruits raised on the lands of the manufacturer, or purchased by him from the growers thereof,

or of brandy manufactured from fruits and sold in original packages of not less than five gallons, shall not be restricted to incorporated towns and cities, but the same may be manufactured in any place where such manufacture is not otherwise forbidden by law.

1903, c. 233, s. 1.

II. LICENSE.

2040. Necessary. No person shall sell or otherwise dispose of for gain any spirituous, vinous or malt liquors, or intoxicating bitters without first obtaining, as provided by law, a license so to do. Nothing in this section shall prevent any person selling wines of his own manufacture at the place of manufacture or within one hundred yards thereof, in quantities of not less than one gallon, except when sold to churches for communion services, nor brandy manufactured by the seller from fruit or grapes and sold in original packages of not less than five gallons.

1903, c. 233, ss. 2, 6; 247, s. 60.

2041. Issued to druggists outside of towns. All druggists may sell spirituous, vinous and malt liquors for use by a sick person upon the written prescription of a legally qualified physician having such person under his charge, and not otherwise. No druggist shall duplicate the prescription of a physician for intoxicating liquors. All druggists selling liquors by prescription shall keep a record thereof showing the true date of sale, the name of the person for whom sold, the name of the person to whom delivered, and the quantity sold, which record shall at all times be open to the inspection of any person desiring to see it. Nothing in this section shall be construed so as to relieve druggists from complying with the law as to license and taxes.

1903, c. 233, ss. 1, 5.

2042. Application for. Every person desiring to sell liquors shall make application to the board of county commissioners for an order to the sheriff to issue license. The application shall be in writing and shall show that the applicant is a bona fide citizen of the United States and a legal voter of North Carolina; that he has never been convicted nor confessed his guilt in a court of competent jurisdiction, of any violation of the laws of any state regulating the sale of liquors; and the place where the business is to be carried on, which in all cases (druggists excepted) must be within an incorporated town or city, and more than two hundred feet in a direct line from any church edifice or the premises pertaining thereto. The application must have been approved before filing by the board of commissioners, aldermen or governing body by whatever name called, of the city or town in which it is proposed to carry on the

business, and must be accompanied by the affidavit of six freeholders who are tax payers and residents of the township in which the applicant proposes to do business, all of whom shall declare upon oath that the applicant is a proper person to sell spirituous, vinous or malt liquors; that the building specified is a suitable place for the business to be carried on, and that he has not recommended any other person for liquor license in the same township.

1903, c. 247, s. 66.

2043. Hearing, and order for. At the hearing of the application by the board of county commissioners any person who may consider himself aggrieved by the granting of the license applied for may contest the same and may produce evidence in contradiction of any of the allegations of the application or show any other reason why the license should not be granted. If satisfied of the truth of the allegations of the application and affidavit, the board of county commissioners may grant an order to the sheriff to issue such license, except in territory where the sale of liquor is prohibited by law.

1903, c. 247, s. 66.

2044. Form and issuing. The license shall be printed in such form as the treasurer of the state may prescribe and furnished by the register of deeds, and shall be issued by the sheriff upon order of the board of county commissioners after the payment of the taxes required by law. Any person, taking out license as provided in this chapter on any date after the first day of July or January, shall pay the whole amount of tax for the six months ending the thirty-first day of December, or the thirtieth day of June, as the case may be, after the date of license.

1903, c. 247, s. 66.

2045. Posted in place of business. All persons taking out license to sell spirituous, vinous or malt liquors, or any mixture thereof, shall post up in some public place in their place of business the license issued to them. Any person failing to post up the license as provided in this section shall be considered as doing business without license.

1903, c. 247, s. 66.

2046. Revoked. The board of county commissioners, upon complaint made by any resident of the county that any person holding a license under this chapter has violated the laws of this state regulating the sale of liquors, shall forthwith summon such person to appear before them at a time given, within thirty days, to show cause why such license and the order to issue same should not be

revoked, and upon satisfactory evidence of his guilt, shall revoke any license heretofore granted by them.

1903, c. 247, s. 66.

III. LOCAL OPTION ELECTIONS.

2047. When ordered, what submitted. It shall be the duty of the governing body of any city or town, upon the petition of one-third of the registered voters therein, who were registered for the preceding municipal election, to order an election to be held, after thirty days' notice, in any year in which the petition may be filed, except within ninety days of any city, county or general election, in time for the notice to be given as above required, to determine—

1. Whether intoxicating liquors shall be manufactured in such city or town. 2. Whether barrooms or saloons shall be established in such city or town. 3. Whether dispensaries shall be established in such city or town. And any such election may be ordered to determine any one or two or all of such questions, as the petitioners may designate in their petition. No such election shall be held oftener than once in two years.

1903, c. 233, s. 7.

2048. How conducted. Whenever such election shall be held, it shall be conducted and held under the provisions of law regulating municipal elections.

1903, c. 233, s. 8.

2049. Boxes provided, what tickets voted. Whenever the governing body of any city or town shall order any such election, they shall provide one box to determine the question of manufacture of liquors, if such question is to be voted upon; one box to determine the sale by saloons, if such question is to be voted upon; and one box to determine the sale by dispensaries if such question is to be voted upon. Any person entitled to vote for members of the general assembly shall have the right to vote at such elections in all the boxes provided, and every such voter who is in favor of the manufacture of intoxicating liquors shall vote a ticket on which shall be written or printed the words "For Distilleries," and all opposed to the manufacture of intoxicating liquors shall vote a ticket on which shall be written or printed the words "Against Distilleries;" and every such voter who is in favor of barrooms or saloons shall vote a ticket on which shall be written or printed the words "For Saloons," and all opposed to them shall vote a ticket on which shall be written or printed the words "Against Saloons;" and every such voter who is in favor of dispensaries shall vote a ticket on which shall be written or printed the words "For Dispensaries," and all opposed to them shall vote a

- ticket on which shall be written or printed the words "Against Dispensaries." Such tickets shall be of white paper and without device.
1903, c. 233, s. 9.

2050. Distilleries, when allowed. If a majority of the votes cast in any such election shall be "Against Distilleries," when that question is voted upon, then it shall be unlawful for any person to manufacture any intoxicating liquors in such city or town until another election shall be held reversing such election. But if a majority of the votes cast in any such election in any city or town shall be "For Distilleries," then it shall be lawful to manufacture and sell at wholesale intoxicating liquors in such city or town. This section shall not be construed to authorize the manufacture of intoxicating liquors in any town except upon a full compliance with the conditions and requirements which may now or hereafter be imposed by law.

1903, c. 233, s. 10.

2051. Saloons, when licensed. If a majority of the votes in any such election in any city or town shall be "Against Saloons," then it shall be unlawful for the county commissioners of any such county, or the governing body of any such town, to grant license to any person for the sale of spirituous, vinous, malt or other intoxicating liquors whatever in such city or town until another election shall be held reversing such election: Provided, that liquor dealers in such cities or towns holding license at the time of the election shall be allowed six months after such election in which to close out their stock on hand at the time of such election, if their license so long remain in force. But if a majority of any such votes cast in any such election shall be "For Saloons," then the board of county commissioners of such county, and the governing body of such city or town, shall grant license to sell intoxicating liquors in such city or town to all proper persons applying for the same according to law. And such license shall be granted until another election shall be held reversing such election: Provided further, that this section shall not be construed to authorize any person to sell, either by retail or wholesale, intoxicating liquors in such city or town, except upon a full compliance with the conditions and requirements which may now or hereafter be imposed by law.

1903, c. 233, s. 11.

IV. DISPENSARIES.

2052. When established. If a majority of the votes cast at any such election shall be "Against Dispensaries," then it shall be unlawful to establish any dispensary in such city or town until another election shall be held reversing such election. But if a majority of

the votes cast at any such election be "For Dispensaries," then the board of commissioners of such city or town shall establish a dispensary therein.

1903, c. 233, s. 12.

2053. Commissioners appointed. Whenever it shall become lawful under the provisions of this chapter to establish a dispensary in any city or town, the governing body of such city or town shall appoint three commissioners from the voters of such city or town, who, in the election, voted for dispensaries, whose duty it shall be to conduct such dispensaries under such rules and regulations, and with such officers and employees, as may be prescribed and allowed by the governing body of such city or town, who shall fix the compensation of said commissioners and their officers and employees.

1903, c. 233, s. 13.

2054. Terms of office fixed; removal; bonds. The governing body of any city or town in which a dispensary shall be established under the provisions of this chapter, shall have power to fix the terms of office of the dispensary commissioners, and determine the amount of bonds required from the commissioners and officers, and shall have the power to remove any or all commissioners and any officers or employees appointed by such commissioners, for good cause shown.

1903, c. 233, s. 18.

2055. Sales in, how made. No liquor of any kind shall be sold in any dispensary on Sunday or election days, and no dispensary shall ever be open or liquor sold therein before sunrise or after sunset on any day. The prices at which liquor shall be sold shall be fixed by the dispensary commissioners. All sales shall be for cash and at a profit not to exceed eighty per centum of the cost thereof. No liquor shall be sold in any dispensary except in unbroken packages or bottles, which shall contain not less than one-half pint and not more than one quart. The manager of a dispensary shall prohibit loafing, loitering or drinking on the premises. It shall be the duty of the manager to keep a register, on which shall be kept a record of the names of persons to whom any liquors are sold, the quantity sold, price paid, and date of sale. Such register shall be open only to the inspection of the dispensary commissioners and its employees, and the contents thereof shall not be published. No intoxicating liquors shall be sold to any minors, and the dispensary commissioners shall make such rules and regulations not inconsistent with this chapter as may be proper for the management of the dispensary.

1903, c. 233, s. 14.

2056. Unlawful to sell except in dispensary. In any town in which a dispensary is established under the provisions of this chapter, it shall be unlawful for any person to sell or otherwise dispose of for gain any intoxicating liquors other than in the manner provided for sales in the dispensary as aforesaid.

1903, c. 233, s. 15.

2057. Proceeds disposed of. The dispensary commissioners shall make quarterly settlements with the governing body of the city or town in which any dispensary may be situated, and such governing body shall, within ten days after such settlement, pay one-half of the net profits of such dispensary into the treasury of such city or town, and the other half into the treasury of the county in which such city or town is located, for the benefit of the public schools of said county.

1903, c. 233, s. 16.

V. SPECIAL ACTS.

2058. Not repealed. Nothing in this chapter shall be construed to repeal, alter or amend any special act prohibiting or regulating the manufacture or sale of liquors in any locality, township, county or incorporated city or town.

1903, c. 233, s. 19.

2059. Place of delivery, place of sale. The place where delivery of any spirituous, malt, vinous, fermented or other intoxicating liquors is made shall be construed and held to be the place of sale thereof, and any station or other place to which any person shall ship or convey any spirituous, malt, vinous, fermented or other intoxicating liquors for the purpose of delivery or carrying the same to a purchaser, shall be construed to be the place of sale.

1903, c. 349, s. 2.

NOTE. For crimes arising from violations of this chapter, see Crimes.

CHAPTER 51.

MARRIAGE.

| | |
|--------------------------|-----------|
| | Sections. |
| I. How contracted, | 2060 |
| II. Contracting parties, | 2061—2064 |
| III. The license, | 2065—2071 |

I. HOW CONTRACTED.

2060. What constitutes. The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination or of a justice of the peace and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage: Provided, that the right of marriage among the Society of Friends, according to a form and custom peculiar to themselves shall not be interfered with by the provisions of this or any other section of this chapter.

Code, s. 1812; 1871-2, c. 193, s. 3.

II. CONTRACTING PARTIES.

2061. Who may marry. All unmarried male persons of sixteen years, or upwards, of age, and all unmarried females of fourteen years, or upwards, of age, may lawfully marry, except as herein-after forbidden.

Code, s. 1809; R. C., c. 68, s. 14; 1871-2, c. 193.

2062. Who may not marry. All marriages between a white person and a negro or indian, or between a white person and person of negro or indian descent to the third generation, inclusive, or between a Croatan Indian and a negro, or between a Croatan Indian and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under fourteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: Provided, that no marriage

followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person, and the other a negro or indian, or of negro or indian descent to the third generation, inclusive, and for bigamy.

Code, s. 1810; R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; 1887, c. 245.

Note. See Divorce and Alimony, s. 1507.

2063. Prohibited degrees of kinship. Whenever the degree of kinship shall be estimated with the view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood: Provided, that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole-blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole blood.

Code, s. 1811; 1879, c. 78.

2064. Marriages between slaves validated. Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, chapter forty, of the acts of the general assembly, ratified March tenth, one thousand eight hundred and sixty-six, shall be deemed to have been lawfully married.

Code, s. 1842; 1866, c. 40, s. 5.

III. THE LICENSE.

2065. Unlawful to perform ceremony without. No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there shall be delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy.

Code, s. 1813; 1871-2, c. 193, s. 4.

2066. Penalty for performing ceremony without. Every minister or officer who shall marry any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who shall fail to return such license to the register of deeds within two months after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who shall sue therefor.

Code, s. 1817; R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8.

Note. For further penalty, see Crimes.

2067. Issued by register of deeds. Every register of deeds shall, upon application, issue a license for the marriage of any two persons: Provided, it shall appear to him probable that there is no legal impediment to such marriage: Provided further, that where either party to the proposed marriage shall be under eighteen years of age, and shall reside with the father, or mother, or uncle, or aunt, or brother, or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom said infant was placed at school, and under whose custody and control he or she is, shall be delivered to him, and such written consent shall be filed and preserved by the register. And whenever it shall appear to the register of deeds that it is probable there is any legal impediment to the marriage of any person for whom a license is applied he shall have power to administer to the person so applying an oath touching the legal capacity of said parties to contract a marriage.

Code, s. 1814; 1887, e. 331; 1871-2, e. 193, s. 5.

2068. Form of license. License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, or to any justice of the peace for county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged...years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged...years (race, as the case may be), the daughter of (here state the names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties shall be under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within one year from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within two months after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this....day of.....19....

L. M.,

Register of Deeds of.....County.

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored" or "indian" as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also

be signed by one or more witnesses present at the marriage, who shall add to their names their places of residence, as follows:

I, N. O., an ordained minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the....day of.....19...., at the house of P. R., in (here name the town, if any, the township and county), according to law.

N. O.

Witnesses present at the marriage:

S. T., of (here give the residence).

Code, s. 1815; 1899, c. 541, ss. 1. 2; 1871-2, c. 193, s. 6.

2069. Penalty for issuing unlawfully. Every register of deeds who shall knowingly or without reasonable inquiry, personally or by deputy, issue a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or other person standing in loco parentis who shall sue for the same.

Code, s. 1816; 1895, c. 387; 1901, c. 722; R. C., c. 68, s. 13; 1871-2, c. 193, s. 7.

2070. Record of, kept by register of deeds; original filed. Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

“Record of marriage licenses and of returns thereto, for the county of, from the day of, 19..., to the day of, 19..., both inclusive.”

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband, with his residence; in the third, his age; in the fourth, his race and color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of all or at least three of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved.

Code, s. 1818; 1899, c. 541, s. 3; 1871-2, c. 193, s. 9.

2071. Penalty for failure to record license and the return.

Any register of deeds who shall fail to record, in the manner above prescribed, the substance of any marriage license issued by him, or who shall fail to record, in the manner above prescribed, the substance of any return made thereon, within ten days after such return made, shall forfeit and pay two hundred dollars to any person who shall sue for the same.

Code, s. 1819; 1871-2, c. 193, s. 10.

CHAPTER 52.

MARRIED WOMEN.

| | Sections. |
|--|-----------|
| I. Separate estate of, | 2072—2079 |
| II. Rights and liabilities of husbands, | 2080—2084 |
| III. Contracts between husband and wife, | 2085—2086 |
| IV. Divorce and separation, | 2087—2089 |
| V. Free traders, | 2090—2095 |

I. SEPARATE ESTATE OF.

2072. Secured; disposed of by will; conveyed with husband's written assent. The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried.

Const., Art. X, s. 6.

Note. For purchase money mortgage executed by husband alone, see s. 3054.

2073. Can not contract without husband's consent. No woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed.

Code, s. 1826; 1871-2, c. 193, s. 17.

Note. For laborer's and material liens against, see s. 1966.

2074. May draw checks. Bank deposits made by or in the name of a married woman shall be paid only to her or on her order, and her check, receipt or acquittance shall be valid in law to fully discharge the bank from any and all liability on account thereof.

1891, c. 221, s. 30; 1893, c. 344.

2075. What leases require joinder of husband and privy examination. No lease or agreement for a lease or sublease or assignment by any married woman, not a free trader, of her lands or tenements, or chattels real, to run for more than three years, or to begin in possession more than six months after its execution, or any conveyance of any freehold estate in her real property, shall be valid, unless the same be executed by her and her husband, and proved or acknowledged by them, and her free consent thereto, appear on her examination separate from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*.

Code, s. 1834; 1871-2, c. 193, s. 26.

2076. Land of, not sold or leased without their consent; husband's interest exempt from execution. No real estate belonging at the time of marriage to females, married since the third Monday of November, one thousand eight hundred and forty-eight, nor any real estate by them subsequently acquired, nor any real estate acquired on and since the first day of March, one thousand eight hundred and forty-nine, by *femes covert*, who were such on the said third Monday of November, one thousand eight hundred and forty-eight, shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife, first had and obtained, to be ascertained and effectuated by deed and privy examination, according to the rules required by law for the sale of lands belonging to *femes covert*. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him; and every such sale is hereby declared null and void.

Code, s. 1840; R. C., c. 56; 1848, c. 41.

2077. May make a will. Every married woman shall have power to devise and bequeath her real and personal estate as if she were a *feme sole*; and her will shall be proved as is required of other wills.

Code, s. 1839; 1871-2, c. 193, s. 31.

2078. Separate savings; husband's liability for use of. The savings from the income of the separate estate of the wife are her separate property. But no husband who, during the coverture (the wife not being a free trader under this chapter), has received, without objection from his wife, the income of her separate estate, shall

be liable to account for such receipt, for any greater time than the year next preceding the date of a summons issued against him in an action for such income, or next preceding her death.

Code, s. 1837; 1871-2, c. 193, s. 29.

2079. Liable for ante-nuptial debts. The liability of a feme sole for any debts owing, or contracts made or damages incurred by her before her marriage, shall not be impaired or altered by such marriage:

Code, s. 1823; 1871-2, c. 193, s. 14.

II. RIGHTS AND LIABILITIES OF HUSBANDS.

2080. Tenant by the courtesy, when. Every man who hath married, or shall marry a woman, and by her have issue born alive, shall after her death, he surviving, be entitled to an estate, as tenant by the courtesy during his life, in all the lands, tenements and hereditaments whereof his said wife was beneficially seized in deed during the coverture, wherein the said issue was capable of inheriting, whether the said seizin was of a legal or of an equitable estate; except that when the wife shall have obtained a divorce a mensa et thoro, and shall not be living with her husband at her death, or when the husband shall have abandoned his wife, or shall have maliciously turned her out of doors, and they shall not be living together at her death; or if the husband shall have separated himself from his wife, and be living in adultery at her death, he shall not be tenant by the courtesy of her lands, tenements and hereditaments.

Code, s. 1838; 1871-2, c. 193, s. 30.

2081. Party to action against wife; may defend. In all actions brought against a married woman, who is not a free trader (as hereinafter provided for), the summons shall be served upon the husband also, and on motion to the court in which the action is pending, he may be allowed, with her consent, to defend the same in her name and behalf, but no judgment shall be given against him, upon any liability claimed against her arising before the marriage or upon any contract made by her alone after her marriage.

Code, s. 1824; 1871-2, c. 193, s. 15.

2082. Discharged from defense, when; pays cost. Whenever any husband shall be allowed to defend for his wife, he may be ordered to pay costs for any misconduct, and may be discharged from the conduct of her defense, if it shall appear to the court that his defense is not bona fide in her interest.

Code, s. 1825; 1871-2, c. 193, s. 16.

2083. Jointly liable for wife's torts. Every husband living with his wife shall be jointly liable with her for all damages accruing from any tort committed by her and for all costs and fines incurred in any criminal proceeding against her.

Code, s. 1833; 1871-2, c. 193, s. 25.

2084. Not liable for ante-nuptial debts. No man by marriage shall incur any liability for any debts owing, or contracts made, or for wrongs done by his wife before the marriage.

Code, s. 1822; 1871-2, c. 193, s. 13.

III. CONTRACTS BETWEEN HUSBAND AND WIFE.

2085. Void without approval of probating officer. No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract shall be in writing, and be duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be.

Code, s. 1835; 1871-2, c. 193, s. 27.

2086. When valid. Contracts between husband and wife not forbidden by the preceding section and not inconsistent with public policy are valid, and any persons of full age about to be married, and subject to the preceding section, any married persons may release and quitclaim dower, tenancy by the courtesy, and all other rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released.

Code, s. 1836; 1871-2, c. 193, s. 28.

IV. DIVORCE AND SEPARATION.

2087. Property rights after divorce a vinculo. When a marriage shall be dissolved a vinculo, the parties respectively shall thereby lose all his or her right to an estate by the courtesy, or dower, and all right to any year's provision or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party, which by settlement before or after marriage was settled upon such party in consideration of the marriage only.

Code, s. 1843; 1871-2, c. 193, s. 42.

2088. Effects of elopement. If any married woman shall elope with an adulterer, or shall wilfully and without just cause abandon her husband and refuse to live with him, and shall not be living with her husband at his death, or if a divorce from bed and board be granted on the application of the husband, she shall thereby lose all right to dower in the lands and tenements of her husband, and also all right to a year's provision, and to a distributive share from the personal property of her husband, and all right to administration on his estate, and also all right and estate in the property of her husband, settled upon her upon the sole consideration of the marriage, before or after marriage; and such elopement may be pleaded in bar of any action, or proceeding, for the recovery of such rights and estates; and in case of such elopement, abandonment, or divorce, the husband may sell and convey his real estate as if he were unmarried, and the wife shall thereafter be barred of all claim and right of dower therein.

Code, s. 1844; 1893, c. 153, ss. 1, 2, 3; 1871-2, c. 193, s. 44.

2089. Effect of husband living in adultery. If any husband shall separate from his wife and live in adultery, or shall wilfully and without just cause abandon his wife and refuse to live with her, and such conduct on his part is not condoned by her, or if a divorce from bed and board be granted on the application of the wife, he shall thereby lose all right to courtesy in the real property of the wife, and also all right and estate of whatever character in and to her personal property, as administrator, or otherwise; and also any right and estate in the property of the wife which may have been settled upon him solely in consideration of the marriage by any settlement before or after marriage, and in case of such adultery and abandonment or divorce, the wife may sell and convey her real property as if she were unmarried, and the husband, if there has been no condonation at the time of the conveyance, shall

thereafter be barred of all claim and right to courtesy in such real property.

Code, s. 1845; 1893, c. 153, s. 4; 1871-2, c. 193, s. 45.

NOTE. See Divorce and Alimony.

V. FREE TRADERS.

2090. How created. Every married woman of the age of twenty-one years or upwards, with the consent of her husband, may become a free trader in the manner following:

1. By ante-nuptial contract, proved and registered, as herein after required; or,
2. By she and her husband signing a writing in the following or some equivalent form:

A. B., of the age of twenty-one years or upwards, wife of C. D., of..... county, with his consent, testified by the signature hereto, enters herself as a free trader from the date of the registration hereof.

(Signed)

A. B.
C. D.

Witness: E. F.

Registered this....day of.....19....

The said writing may be proved by the subscribing witness or acknowledged by the parties before any officer authorized to take the probate of deeds, and shall be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business.

Code, s. 1827; 1871-2, c. 193, ss. 18, 19.

2091. Dates from registration. From the time of the registration of the writing mentioned in the preceding section, the married woman therein mentioned shall be a free trader, and authorized to contract and deal as if she were a feme sole.

Code, s. 1828; 1871-2, c. 193, s. 20.

2092. Certified copy evidence. A copy of such writing, duly proved and registered and certified by the register of the county in which the same is registered, shall be admissible in evidence as certified copies of registered deeds are, or may be allowed to be.

Code, s. 1829; 1871-2, c. 193, s. 21.

2093. How ended; publication. The right of a married woman to act as a free trader may be ended at any time by an entry by her, or by her attorney, in the margin of the registration of the writing above mentioned, to the effect that from the date of such marginal entry, she ceases so to act, and by publication to that effect weekly for three weeks in some newspaper published in the county in which she had her principal or only place of business, or if there shall be none so published, then in any other convenient

newspaper. But such entry and publication shall not impair any liabilities incurred previously thereto, nor prevent such married woman from becoming liable afterwards to any person whom she may fraudulently induce to deal with her as a free trader.

Code, s. 1830; 1871-2, c. 193, s. 22.

2094. Living separate from husband; husband idiot or lunatic.

Every woman who shall be living separate from her husband, either under a judgment of divorce by a competent court, or under a deed of separation, executed by said husband and wife, and registered in the county in which she resides, or whose husband shall have been declared an idiot or a lunatic, shall be deemed and held, from the docketing of such judgment, or from the registration of such deed, or from the date of such idiocy or lunacy and during its continuance, a free trader, and shall have power to convey her personal estate and her real estate without the assent of her husband.

Code, s. 1831; 1871-2, c. 193, s. 23; 1880, c. 35.

2095. Abandoned by husband. Every woman whose husband shall abandon her, or shall maliciously turn her out of doors, shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, but the liability of her husband for her reasonable support shall not thereby be impaired, and she shall have power to convey her personal estate and her real estate without the assent of her husband.

Code, s. 1832; 1871-2, c. 193, s. 24.

NOTE. For marriage settlements, see Conveyances.

For effect of marriage settlement on creditors, see Conveyances, s. 915.

For judgment entered against married women, see Civil Procedure, s. 523.

CHAPTER 53.

MILLS.

| | Sections. |
|------------------------------|-----------|
| I. Public, | 2096—2098 |
| II. Water mills established, | 2099—2107 |
| III. Damages, | 2108—2112 |

I. PUBLIC.

2096. What are. Every water grist-mill, steam mill, or wind-mill, that shall grind for toll, shall be a public mill.

Code, s. 1846; R. C., c. 71, s. 1; 1777, c. 122, s. 1.

2097. Grind according to turn; toll taken. All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the indian corn and wheat, and one-fourteenth part for chopping grain of any kind; and every miller and keeper of a mill making default therein shall, for each offense, forfeit and pay five dollars to the party injured: Provided, that the owner may grind his own grain at any time.

Code, s. 1847; R. C., c. 71, s. 6; 1777, c. 122, s. 10; 1793, c. 402.

2098. Measures kept, toll by weight. All millers shall keep in their mills the following measures, namely, a half-bushel and peck of full measure, and also proper toll-dishes for each measure; but the toll allowed by law may be taken by weight or measure at the option of the miller and customer.

Code, s. 1848; 1885, c. 202; R. C., c. 71, s. 7; 1777, c. 122, s. 11.

NOTE. Keeping false toll-dishes a misdemeanor, see Crimes.

II. WATER MILLS/ ESTABLISHED.

2099. Procedure. Any person wishing to build a water mill, who hath land on only one side of a stream, shall issue a summons returnable to the superior court of the county in which the land sought to be condemned, or some part of it, lies, against the persons in possession and the owners of the land on the opposite side of the stream, and against such others as have an interest in the controversy, and the procedure shall be as is provided in other special proceedings, except so far as the same may be modified by this chapter.

Code, s. 1849; 1868-9, c. 158, s. 1.

2100. Commissioners appointed, how. If no just cause should be shown against the building of such mill, the court shall appoint three freeholders, one of whom shall be chosen by the plaintiff, another by the defendants, and the third by the court, or if the plaintiff or defendants shall refuse or fail, or unreasonably delay to name a commissioner, the court shall name one in lieu of such delinquent party. These commissioners may be changed from time to time by permission of the court for just cause shown.

Code, s. 1850; 1868-9, c. 158, s. 2.

2101. What commissioner presides; penalty for failure to perform duty. The third commissioner shall cause the others to be notified of the time and place of meeting, and shall preside at their

meetings. They may, if necessary, summon and examine witnesses, who shall be sworn by the presiding commissioner; any commissioner named by or for either of the parties, who, without just cause, shall fail to attend any meeting notified by the president, shall forfeit and pay to the opposite party fifty dollars; and if the president shall, in like manner, unreasonably delay to notify the other commissioners of a meeting, or fail to attend one that is appointed, he shall forfeit and pay to the plaintiff fifty dollars, and to the defendant a like sum.

Code, s. 1851; 1868-9, c. 158, s. 3.

2102. Duty of commissioners. The commissioners shall be sworn by some officer qualified to administer an oath to act impartially between the parties, and to perform the duties herein imposed on them honestly and to the best of their ability. They shall view the premises where the mill is proposed to be built, and shall lay off and value a portion of the land of the plaintiff, not to exceed one acre in area, and an equal area of the land of the defendants opposite thereto, and report their proceedings to the court within a reasonable time, not exceeding sixty days.

Code, s. 1852; 1868-9, c. 158, s. 4.

2103. Report contains what. The report of the commissioners shall set forth—

1. The location, quantities and value of the several areas laid off by them.

2. Whether either of them includes houses, gardens, orchards or other immediate conveniences.

3. Whether the proposed mill will overflow another mill or create a nuisance in the neighborhood.

4. Any other matter upon which they shall have been directed by the court to report, or which they may think necessary to the doing of full justice between the parties.

Code, s. 1853; 1868-9, c. 158, s. 5.

2104. When mill not allowed. If the area laid off on the land of either party take away houses, gardens, orchards, or other immediate conveniences; or if the mill proposed will overflow another mill, or will create a nuisance in the neighborhood, the court shall not allow the proposed mill to be built.

Code, s. 1854; 1868-9, c. 158, s. 6.

2105. Power of court on return of report. If the report be in favor of building the proposed mill, and is confirmed, then the court may, in its discretion, allow either the plaintiff or defendant to erect such mill at the place proposed, and shall order the costs, and

the value of the opposite area, to be paid by the party to whom such leave shall be granted; and upon such payment, the party to whom such leave shall be granted shall be vested with title in fee to the opposite area. Such payment may be made into court for the use of the parties entitled thereto.

Code, s. 1855; 1868-9, c. 158, s. 7.

Note. For costs, see Costs.

2106. Built when; kept up. The person to whom leave shall be granted shall, 'within one year, begin to build such water mill, and shall finish the same within three years; and thereafter keep it up for the use and ease of such as shall be customers to it; otherwise, the said land shall return to the person from whom it was taken, or to such other person as shall have his right, unless the time for finishing the mill, for reasons approved by the court, be enlarged.

Code, s. 1856; 1868-9, c. 158, s. 8.

2107. Time in which must be rebuilt. If any water mill belonging to any person not being of age, a married woman, or of unsound mind, or imprisoned, falls, burns, or is otherwise destroyed, such person and his heirs shall have three years to rebuild and repair the same, and any person under any disability aforesaid shall have three years from the removal of the disability.

Code, s. 1857; 1903, c. 74, ss. 1, 2; 1868-9, c. 158, s. 9.

III. DAMAGES.

2108. For erection of mills; procedure. Any person conceiving himself injured by the erection of any gristmill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the endamaged land, or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions.

Code, s. 1858; 1876-7, c. 197, s. 1.

2109. Dams, when abated as nuisances. When damages shall be recovered in final judgment in such civil actions and execution shall issue and be returned unsatisfied, and the plaintiff is not able to collect the same either from the insolvency of the defendant or by reason of the exemptions allowed to defendant, the judge shall,

on the facts being made to appear before him by affidavit or other evidence, order that the dam, or portion of the dam, or other cause creating the injury, shall be abated as a nuisance, and he shall have power to make all necessary orders to effect this purpose.

Code, s. 1859; 1876-7, c. 197, s. 3.

2110. Judgment binding five years, when. A judgment giving to the plaintiff an annual sum by way of damages shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages shall be increased by raising the water or otherwise.

Code, s. 1860; 1868-9, c. 158, s. 12.

2111. Judgment binding one year, when. In all cases where the final judgment of the court shall assess the yearly damage of the plaintiff as high as twenty dollars, nothing in this chapter contained shall be construed to prevent the plaintiff, his heirs or assigns, from suing as heretofore, and in such case, the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons.

Code, s. 1861; 1868-9, c. 158, s. 14.

2112. Judgment against plaintiff; costs, how paid. If the final judgment of the court shall be that the plaintiff hath sustained no damage, he shall pay the costs of his proceeding; but if the final judgment shall be in favor of the plaintiff, he shall have execution against the defendant for one year's damage, preceding the issuing of the summons, and for all costs: Provided, that if the damage adjudged do not amount to five dollars, the plaintiff shall recover no more costs than damages. And if the defendant do not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum adjudged as the damages for that year, the plaintiff may sue out execution for the amount of the last year's damage, or any part thereof which may remain unpaid.

Code, s. 1862; 1868-9, c. 158, s. 15.

CHAPTER 54.

NAMES OF PERSONS.

(Sections 2113—2117.)

2113. Can not be altered by legislature. The general assembly shall not have power to pass any private law to alter the name of any person, * * * but shall have power to pass general laws regulating the same.

Const., Art. II, s. 11.

2114. Application to alter before clerk superior court; notice. Any person wishing, for good cause shown, to change his name, shall file his application before the clerk of the superior court of the county in which he may live, first having given ten days' notice of said application by publication at the courthouse door, and in said application shall state the true name of the applicant, the name desired to be adopted, the reasons why said change is desired, and that his name has never been changed before by law. No person shall be allowed to change his name under this chapter but once.

1891, c. 145, ss. 1, 2.

2115. Proof of good character filed. Said applicant shall also file with said petition proof of his good character, which proof must be made by at least two citizens of said county who know the standing of said applicant.

1891, c. 145, s. 3.

2116. Change ordered by clerk. Upon said application being made upon the verified petition of the applicant and the proof of good character, it shall be the duty of the clerk of the superior court, if he thinks good and sufficient reason exists for the change of name, to issue an order changing the name of the applicant from his true name to the name sought to be adopted, and when said order is made and the applicant's name changed said applicant shall be entitled to all the privileges and protection under said new name as he would have been under the old name.

1891, c. 145, s. 4.

2117. Clerk to issue certificate; record made. The clerk shall issue to the applicant a certificate under his hand and seal of office,

stating the change made in said applicant's name, and shall also record said application and order on the docket of special proceedings in his court.

1891, c. 145, s. 5.

NOTE. For corporate names, see Corporations, s. 1009.

For protection of names, see Trade-marks.

For change of name of minor child, see s. 175.

CHAPTER 55.

NAVIGATION.

| | Sections. |
|------------------------------------|-----------|
| I. Cape Fear river, | 2118—2138 |
| II. Pilots, Hatteras and Ocracoke, | 2139—2141 |
| III. Pilots, Beaufort harbor, | 2142—2148 |
| IV. Pilots, Bogue inlet, | 2149—2150 |
| V. Pilots, general provisions, | 2151—2161 |

I. CAPE FEAR RIVER.

2118. Commissioners of navigation, how elected. Annually at their regular meeting in June, the governing body of the city of Wilmington shall elect five, and the governing body of the town of Southport shall elect two commissioners. The seven commissioners so elected shall constitute and be styled the "Board of Commissioners of Navigation and Pilotage for the Cape Fear river." They shall hold their offices for one year and until their successors are elected, and a majority may act in all cases.

Code, ss. 3480, 3481; R. C., c. 85, s. 1; R. S., c. 88, s. 2; 1848, c. 47, s. 3; 1869-70, c. 235, s. 4; 1876-7, c. 238.

2119. Powers and duties of commissioners. The commissioners of navigation and pilotage for the Cape Fear river shall have power—

1. To fill all vacancies which may occur in the board during their term.

2. To appoint a clerk to the board, and cause to be kept in suitable books a record of all the proceedings of the board, together with such rules, regulations and orders as they may prescribe.

3. In all matters concerning the navigation of the waters of the river, from seven miles above Negro-head point, downwards and out over the bar, to make such rules and regulations as may be proper and not inconsistent with the laws of the land.

4. To regulate the throwing of trash in the river.

5. To regulate the fees of pilots or harbor-masters of the port for services required of them by any law, or rule of the board, unless the fees are fixed by law.

6. Subject to the regulations of the United States, to prevent any injury to the channel by wharves or otherwise.

7. To elect a harbor-master for the port of Wilmington and prescribe the duties of his office.

8. From time to time to make and establish such rules and regulations respecting the arrangement and station of pilots as may be most advisable and to enforce them by reasonable fines, forfeitures and penalties.

9. To grant license to pilots.

10. All other matters heretofore authorized by law to be done by the board of navigation and pilotage.

11. To fill any vacancies occurring in the port wardens for the port of Wilmington.

Code, ss. 3480, 3481, 3482, 3483, 3484; R. C., c. 85, ss. 2, 3, 4, 5; R. S., c. 88, s. 2; 1848, c. 47, s. 3; 1869-70, c. 235, s. 4; 1876-7, c. 238; 1802, c. 626, ss. 4, 5; 1786, c. 262, s. 2; 1889, c. 437.

2120. Jurisdiction of commissioners as a court. Each commissioner or any justice of the peace of the counties of New Hanover and Brunswick shall have power and authority to hear and determine all matters of dispute between any pilot and master of a vessel, or between the pilots themselves, respecting the pilotage of vessels; and any one of them may issue a warrant against any pilot for the recovery of any demand which one pilot may have against another relative to pilotage, and for the recovery of any forfeiture or penalty incurred by any act of the general assembly for regulating the pilotage of Cape Fear river and bars, or incurred by any by-law or rule passed in virtue thereof; which warrant the sheriff or any constable of New Hanover county shall execute, together with all other process authorized by this chapter. And on any warrant, issued as aforesaid, any one of said commissioners may give judgment for any sum, not exceeding sixty dollars, and may issue execution thereon, in the manner of issuing execution on judgments given by justices of the peace; which may be executed agreeably to the rules and regulations prescribed for the levy and sale under executions issuing on judgments rendered by justices of the peace; and such commissioners shall issue summonses for witnesses, and administer oaths as is done in cases of trial before justices of the peace.

Code, s. 3491; R. C., c. 85, s. 7; 1802, c. 626, s. 2; 1858-9, c. 23, s. 5.

2121. Stay of execution not allowed; parties may appeal. There shall be no stay of execution on any judgment obtained by pilots against masters of vessels, or by masters of vessels against

pilots, or by pilots against pilots, on account of any compensation or detention, or for any forfeiture or penalty payable to any pilot or master of a vessel, by a pilot or master of a vessel, in virtue of any act of the general assembly, or by law made in pursuance thereof; but appeals shall be allowed in such cases under the rules which regulate appeals from the judgments of justices of the peace: Provided, that, if on the appeal of any defendant, the recovery shall not be lessened, and it shall be the opinion of the court that the appeal was obtained for the purpose of delay, the court shall adjudge the defendant to pay twenty per cent. on the amount of the original judgment, which shall be added thereto, and execution shall issue for the whole amount.

Code. s. 3492; R. C., c 85, s. 8; 1802, c. 626, s. 3.

2122. Harbor-master of Wilmington; duties. The harbor-master appointed for the port of Wilmington shall hold his office for one year next ensuing and until his successor is appointed. He shall comply with all of the orders of the board of commissioners of navigation and pilotage of the Cape Fear river. The harbor-master shall have power and is required—

1. To keep the channel-way of the Cape Fear river and the track of vessels clear; to berth vessels at appropriate wharves or docks; to change the berth of any vessel at request of the owner of the wharf or dock; to move such vessels to some other wharf or to a safe anchorage in the stream; and he is further authorized and required to determine in all cases how far and in what instances it is the duty of masters and others having charge of vessels, flats, rafts or crafts to accommodate each other in their respective berths and situations.

2. To arrest any person violating this chapter, and to immediately bring such offender before some justice of the peace of the county in which such offense may be committed for trial.

3. Whenever in his judgment it shall be necessary, to cast loose from any wharf or dock any raft, flat, vessel or other craft by untying or cutting the lines by which it is made fast, if the owner after notice refuse to remove such vessel.

4. Whenever any of the public docks of the city of Wilmington are obstructed by any vessels, flats, barges, logs, hulks, trash or garbage and the owner thereof can not be found or fails to remove the same from said docks, to take the most speedy method to clear the docks.

5. To appoint in writing some competent person to act in his place and stead during his temporary absence, or at such times as he is unable to attend to the duties of his office, and such person shall, while acting for such harbor-master, have all the power and authority conferred upon and vested in the harbor-master by law.

6. To collect from all vessels arriving in the port of Wilmington the following fees and no others, to-wit: If over one hundred tons and under three hundred tons, three dollars; if over three hundred tons and under five hundred tons, five dollars; if over five hundred tons and under seven hundred tons, seven dollars; if over seven hundred tons, ten dollars. .

Code, s. 3482; 1903, c. 662.

2123. Port wardens, how and when elected; oath of office.

There shall be three competent persons at the port of Wilmington, to be known as port wardens. In the event of the death, resignation or refusal or inability of any port warden to act, the board of commissioners of navigation and pilotage for the Cape Fear river shall at once elect some other person to fill such vacancy. The person so elected shall at once take and subscribe before the clerk of the superior court of New Hanover county the following oath:

I, A. B., do solemnly and sincerely swear that I will faithfully, honestly and impartially execute and discharge the duty of port warden for the port of Wilmington, by duly appraising and estimating the damage sustained on any vessel or goods arriving in or stranded within the bounds of said port, and will make a true and fair estimate and report of and regarding the seaworthiness of any vessel by me surveyed.

1889, c. 437.

2124. Duties and fees of port wardens of Wilmington. The port wardens of Wilmington shall, on request made by the master, owner, freighter or supercargo of any vessel arriving in said port, or stranded within the bounds thereof, survey and make report of her situation and condition, and the causes thereof, and whether she should be repaired or condemned; inspect the conditions of vessels, which may arrive in distress, or may have suffered by gales of wind or otherwise at sea; the situation and condition of goods, wares and merchandise, which may arrive in said vessels, or may have received damage at sea, and report thereon and the probable causes thereof; inspect the storage of cargoes of vessels arriving as aforesaid, or having received damage as aforesaid, before the same shall be discharged, except where vessels may be stranded, in which cases their cargoes may be inspected after the same are removed, and report thereon, whether faulty or not, in which report shall be stated the probable cause of the damage; make surveys of goods, wares and merchandise, and the cargoes of vessels damaged as aforesaid, and make and report estimates of the amount of the damage sustained as aforesaid; and make and report, if required, surveys of vessels outward bound, and report whether they are seaworthy or not, and fit for the voyage intended. All goods which shall be sold by reason of their having received damage as aforesaid, and shall have been surveyed or inspected by the said port wardens, shall be

sold under their inspection and direction; and the said port wardens shall respectively receive for their services: For a survey at the town of Wilmington, the sum of ten dollars; for a survey at the Flats, the sum of twelve dollars; and for a survey at Fort Johnson, the sum of fifteen dollars, to be paid by the party at whose request the same is made, and recovered before any court of competent jurisdiction.

1889, c. 437, ss. 2, 3.

2125. Pilots, how appointed; number. The board of commissioners of navigation and pilotage for the Cape Fear river shall from time to time examine, or cause to be examined, such persons as may offer themselves to be pilots for Cape Fear river and bars, and shall give to such as are approved commissions, under their hands and seals, to act as pilots both for the bars and rivers, according as they shall be found qualified. Before the board shall grant a commission to pilot vessels on Cape Fear river or its bars, it shall be the duty of the board to require the applicant to prove, by at least three nautical men under oath, his competency to manage or work vessels, and such knowledge of the Cape Fear river and its bars as may be necessary to qualify him to pilot vessels. After the number of pilots commissioned, together with apprentices who have acquired the right under existing laws, shall have been reduced by death, resignation or otherwise to the number of thirty, there shall not be, at any one time a greater number than thirty commissioned by the board.

Code, ss. 3484, 3485; 1889, c. 46, s. 3; R. C., c. 85, s. 3; 1802, c. 626, s. 5; 1883, c. 183; 1858-9, c. 23, s. 2.

2126. Class of license granted pilots. The commissioners shall issue three classes of license, as follows:

1. A license to pilot vessels whose draught of water does not exceed nine feet, to such applicants above the age of twenty-one years who have served as apprentices for at least three years, and complied with this chapter.

2. A license to pilot vessels whose draught of water does not exceed twelve feet, to those who have served at least three years under a license of the first class.

3. An unlimited or full license to those who have served at least three years under a license of the second class, to pilot vessels of any draught of water.

Any license shall entitle the pilot holding the same to pilot vessels from the sea to Wilmington and from Wilmington to the sea, and all intermediate points. All licenses shall be for the term of one year, and shall be renewed and the fee for issuing or renewing a license shall be five dollars.

Code, s. 3486; 1887, c. 95; 1889, c. 46, s. 1; 1858-9, c. 23, s. 2.

2127. Rates attached to commission to pilots. The board of commissioners of navigation and pilotage of the Cape Fear river shall cause the rates of pilotage and rules and regulations to be printed on every commission or license issued by them.

Code, s. 3497; R. C., c. 85, s. 9; 1796, c. 470, s. 5.

2128. Number of pilots regulated. The number of pilots and apprentices shall hereafter be regulated by the board of commissioners of navigation and pilotage: Provided, the number of pilots shall not at any one time be reduced below the number of twenty, and apprentices below the number of five and not more than ten.

Code, s. 3489; 1889, c. 46, s. 4; 1869-70, c. 235, s. 6.

2129. Apprentice not to act as pilot. No apprentice shall be authorized by the board to pilot any vessel of more than six feet draught of water.

Code, s. 3494; 1858-9, c. 23, s. 6.

2130. Number of boats fixed; commanded by licensed pilot. The commissioners aforesaid shall determine and make known, as far as occasion may require, to the pilots, how many decked boats are necessary for the attendance on the bars, respectively; in which decked boats any number of said pilots may act and be concerned as partners and joint owners. All boats or vessels, steam or sail, employed in the pilot service on said river and Cape Fear bar shall be commanded by pilots duly licensed according to law.

Code, s. 3498; 1891, c. 486, s. 2; R. C., c. 85, s. 10; 1796, c. 470, s. 3; 1887, c. 95, s. 2.

2131. Rights of pilots to go over any bar. The pilots having branches to pilot over the Main bar, or New Inlet bar, of Cape Fear river, shall be entitled to pilot and navigate vessels into port over either bar; and the pilot who shall bring a vessel into port over either bar, shall be entitled, exclusively, to navigate the same vessel out of port over either bar: Provided, when any vessel shall be ready to go out of port, and such pilot does not attend to navigate the same, the captain or master may employ any other pilot for that purpose, such other pilot being a branch or commissioned pilot for the bar over which the vessel is to be navigated out; and every pilot who shall navigate a vessel out of port contrary to this section, shall for every such offense forfeit and pay forty dollars to the pilot or pilots, who, by this chapter, would have been entitled to navigate said vessel out of port.

Code, s. 3499; R. C., c. 85, s. 11; 1797, c. 486, s. 1.

2132. Penalty on pilots not attending when requested. When any pilot shall have notice from the master of any vessel to attend

in piloting such vessel, and shall not without delay go on board for that purpose, he shall forfeit and pay to the master ten dollars (unless he shall, at the time of such notice, have the actual and personal charge of some other vessel), for each day's delay, caused by his neglect of the vessel which he had notice to attend, and the further sum of one day's expense of such vessel, to be recovered by a warrant under the hand of any one of the commissioners, on oath being made of the fact (which oath any of the commissioners may administer): Provided, that no pilot shall be considered as obliged to take charge of any vessel outward bound, in order to pilot her over either of the bars, until the pilotage be previously paid him, or satisfactory security for the payment thereof be given him.

Code, s. 3501; R. C., c. 85, s. 13; 1784, c. 207, s. 5.

2133. Rates of pilotage. The rates of pilotage on vessels to and from the sea to Southport and Wilmington shall be, each way, according to the following schedule:

| Every vessel drawing— | | To Southport. | To Wilmington |
|-----------------------|-----|------------------|------------------|
| 6 feet and under | 6½ | \$ 12.50 | \$ 18.50 |
| 6½ “ “ “ | 7 | 13.25 | 20.25 |
| 7 “ “ “ | 7½ | 14.75 | 22.75 |
| 7½ “ “ “ | 8 | 15.50 | 24.00 |
| 8 “ “ “ | 8½ | 16.00 | 25.00 |
| 8½ “ “ “ | 9 | 17.25 | 26.75 |
| 9 “ “ “ | 9½ | 17.75 | 27.50 |
| 9½ “ “ “ | 10 | 19.00 | 29.50 |
| 10 “ “ “ | 10½ | 20.00 | 31.25 |
| 10½ “ “ “ | 11 | 23.00 | 35.00 |
| 11 “ “ “ | 11½ | 25.00 | 38.25 |
| 11½ “ “ “ | 12 | 27.50 | 42.50 |
| 12 “ “ “ | 12½ | 30.50 | 46.50 |
| 12½ “ “ “ | 13 | 34.00 | 52.00 |
| 13 “ “ “ | 13½ | 39.00 | 58.50 |
| 13½ “ “ “ | 14 | 42.00 | 63.00 |
| 14 “ “ “ | 14½ | 46.00 | 69.00 |
| 14½ “ “ “ | 15 | 52.00 | 78.00 |
| 15 “ “ “ | 15½ | 57.00 | 86.00 |
| 15½ “ “ “ | 16 | 61.00 | 93.00 |
| 16 “ “ “ | 16½ | 67.00 | 103.00 |
| 16½ “ “ “ | 17 | 73.50 | 113.00 |
| 17 “ “ “ | 17½ | 80.00 | 123.00 |
| 17½ “ “ “ | 18 | 87.00 | 133.00 |
| 18 “ “ “ | 18½ | 94.00 | 143.00 |
| 18½ “ “ “ | 19 | 102.00 | ----- |
| 19 “ “ “ | 19½ | 110.00 | ----- |
| 19½ “ “ “ | 20 | 120.00 | ----- |
| 20 “ “ “ | 20½ | 130.00 | ----- |

All steam vessels calling at Southport for coal for their own consumption shall only pay one-half of the above fees. Vessels under coasting license shall pay only seventy-five per cent. of above pilotage fees.

Code, s. 3493; 1889, c. 46, s. 3; 1891, c. 486, s. 1; 1897, c. 121; 1887, c. 95, s. 3.

2134. Pilot entitled to full pay when refused. When any master of a vessel not having a pilot on board shall refuse a pilot either coming over the bar into the Cape Fear river or, being in the river, going out any of the inlets or going up or down the Cape Fear river, then each pilot so refused shall be entitled to the full pilotage in the same manner as he would have been had he been actually employed for the purpose of piloting such vessel. But any vessel under sixty tons burden shall not be compelled to take a pilot while crossing the bar, or pay pilotage except where signals are made for a pilot; and no vessel coming in at either of the said inlets with a view to the more convenient prosecution of her voyage, or to make a harbor, shall be subject to the payment of pilotage.

Code, ss. 3502, 3505; R. C., c. 85, s. 17; 1813, c. 866; 1823, c. 1222, ss. 1, 2; 1831, c. 65; 1840, c. 48; 1856-7, c. 1.

2135. When vessel pays one-third pilotage. When any vessel shall come over the bar before a pilot boards her, she shall pay only one-third fees for coming in, unless when it may happen the weather is so bad that no person can board a vessel, in which case, if he shall hail her without the bar, he shall be entitled to full fees.

Code, s. 3503; R. C., c. 85, s. 15; 1786, c. 262, s. 6.

2136. Pilots may run regularly on steamers. The board of commissioners of navigation and pilotage of the Cape Fear river shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers running between the port of Wilmington and other ports in the United States, said pilot to have all the rights and emoluments that belong to the river and bar pilots.

Code, s. 3488; 1869-70, c. 235, s. 5.

2137. When vessel need not take a pilot. No master of a vessel shall be required to take or keep a pilot on board or pay for pilotage in the river or over the bars, who is or has been a full branch pilot or employs a full branch pilot as first mate of his vessel.

Code, s. 3496; 1858-9, c. 23, s. 8.

2138. Pilotage when vessel deepened or lightened. If any vessel deepens or lightens between Wilmington and the Flats, between the Flats and Brunswick, or between Brunswick and Fort Johnson,

the pilot shall be paid for the greatest draught of water, and shall besides be entitled to demand, at the rate of two dollars per day, for every day or part of a day he may be delayed in loading or unloading such vessel.

Code, s. 3504; R. C., c. 85, s. 16; 1790, c. 320, s. 1.

II. PILOTS, HATTERAS AND OCRACOCKE.

2139. Commissioners of navigation for Hatteras and Ocracoke; duties; oaths. John W. Robinson, R. R. Quidley, George L. Styron, William Balance and Charles L. Odine shall constitute a board of commissioners of navigation for the port of Hatteras inlet, of the county of Dare; William E. Howard, Christopher O. Neal, Sr., and Gilbert O. Neal, of the county of Hyde; D. R. Roberts and J. W. Gilgo, of the county of Carteret, shall constitute a board of navigation for the port of Ocracoke inlet, whose duty it shall be to meet at Hatteras and Ocracoke respectively three times in each year, or a majority of the respective board; after giving at least twenty days' notice of each meeting, and when any person is desirous of becoming a pilot at Hatteras or Ocracoke inlets, over the Swashes through Pamlico and Albemarle sounds, he shall be examined by said board, and when found competent to take charge of any ship or vessel as a pilot the board shall issue to him a branch and take the bond authorized by law, and no person shall be authorized to act as a bar or swash pilot unless he shall have a branch from said boards. The said boards shall have their offices at Hatteras and Ocracoke respectively, in which shall be filed the bonds of the pilots, and every pilot receiving a branch from said boards shall pay to the board from which he receives such branch two dollars and fifty cents, of which sum the commissioners of Ocracoke who live in Carteret county shall receive ten cents per mile traveling to and from the meeting of said board, and the residue shall be divided between all the members of said board, and the commissioners shall belong to each board respectively. When a vacancy shall occur in either board by death, resignation or refusal to act, a majority thereof of each board shall appoint some suitable person thereto, whose residence shall be at the same place where the vacancy occurred; said commissioners shall keep a regular journal of their proceedings, and before entering on the duties of their office they shall take and subscribe before any justice of the peace of the counties of Dare, Carteret or Hyde, the following oath:

I do solemnly swear that I will truly and faithfully and impartially examine every person who shall apply to me for a branch, to the best of my ability; so help me, God.

The branch shall expire in three years from the date thereof.

Code, s. 3512; R. C., c. 85, s. 24; 1871-2, c. 134; 1897, c. 211; 1879, c. 216.

2140. Rates of pilotage. Branch pilots of Ocracoke or Hatteras shall be entitled to receive of the commander of such vessel as they may have in charge the following pilotage, namely: For every vessel of sixty and not over one hundred and forty tons burden, from the other side of the bar, at any place within the limits of the pilot ground, to Beacon Island road, or Wallace's channel, ten cents for each ton, and the further sum of two and a half cents for each ton over one hundred and forty, and two dollars for each vessel over either of the swashes (that is, over said swashes either to or from Beacon Island road, or Wallace's channel, or over any shoal lying intermediate between either of said swashes and Beacon Island road or Wallace's channel); for every ship or vessel from the mouth of the swash to either of the ports of Newbern or Washington, one dollar per foot, and for every ship or vessel from the same place to the port of Edenton, twelve dollars; and to the port of Elizabeth City, ten dollars; and the same allowance down as up, and outward as inward.

Code, s. 3524; R. C., c. 85, s. 34; 1794, c. 426; 1806, c. 711; 1846, c. 49, ss. 1, 2, 3.

2141. Who may be pilots for Hatteras and Ocracoke inlets. The said boards shall not issue or grant any branch to pilot vessels through Hatteras inlet to any person who does not reside in Hatteras precinct, which precinct extends from Cape Hatteras light-house to Hatteras inlet. And the said boards shall not issue or grant a branch to pilot vessels through or over Ocracoke inlet to any person who does not reside upon the island of Ocracoke or in the precinct of Portsmouth.

Code, s. 3514; 1856-7, c. 29; 1879, c. 216, s. 3.

III. PILOTS, BEAUFORT HARBOR.

2142. Commissioners of navigation, how elected. The commissioners of navigation for Old Topsail inlet and Beaufort harbor shall be composed of three persons, to be elected as follows: The board of commissioners of Carteret county shall elect one, the commissioners of the town of Beaufort shall elect one, and the commissioners of the town of Morehead City shall elect one. They shall be elected at the regular meeting of such boards in June, one thousand nine hundred and five, and every two years thereafter, and shall qualify by taking the oath required by law before the clerk of the superior court or some justice of the peace of Carteret county, and enter upon the discharge of their duties on the first Monday in July following their election.

1899, c. 9, ss. 1, 2.

2143. Authority of commissioners. They shall have authority in all matters that may concern the navigation of the harbor, Old Topsail inlet and all the waters of the sounds and rivers within ten miles of the town of Beaufort, and in the construction of wharves, and when there is no harbor-master, the commissioners aforesaid shall decide all disputes about the moving of vessels and other matters which properly fall within the department of harbor-master.

Code, s. 3528; 1868-9, c. 208, s. 3.

2144. Harbor-master for Beaufort. The said commissioners immediately after their election shall appoint a harbor-master for the port of Beaufort, who shall hold his office for the term of one year, unless sooner removed by the commissioners for neglect of duty. He shall be entitled to receive of the master of each vessel that shall enter said port, and for other services, such fees as the commissioners may prescribe.

Code, s. 3529; 1868-9, c. 208, s. 4.

2145. Pilots, how appointed and licensed. Such commissioners shall elect the pilots for said inlet and harbor, and may make such rules and regulations for their government as the commissioners may deem right and proper, not inconsistent with the constitution and laws of this state or of the United States. Application for pilot licenses or branches shall be made to the commissioners in writing, giving the name, age and occupation of applicants for two years next preceding the date of application. The commissioners shall examine all applicants for pilot's licenses, and may also examine other persons as to qualification of applicants to perform the duties of pilot, and may in their discretion reject any applicant who they may deem incompetent.

1899, c. 9, ss. 3, 4, 5.

2146. Fees for issuing pilot's license. The said commissioners shall give to every pilot elected by them a license or branch under their hands and seals, which shall be and remain in force for one year, unless, for good cause to said commissioners appearing, the same shall be sooner revoked by them. They shall charge for each license or branch five dollars, which they may retain for their expenses and services.

1899, c. 9, s. 6.

2147. Rates of pilotage. The pilotage for Old Topsail inlet and Beaufort harbor shall be as follows: For vessels drawing less than ten feet, one dollar and fifty cents per foot; ten to twelve feet, two dollars per foot; twelve feet and over, three dollars per foot. The above fees to be collectible in Beaufort harbor from Middle

marsh to Lewis thoroughfare. For every vessel piloted without these bounds an additional charge of fifty cents per foot may be charged. The commissioners shall have the same printed or written on every license or branch issued by them, and every pilot shall exhibit his license to the master of every vessel he has in charge, when demanded by said master. No vessel entering Old Topsail inlet without a pilot shall be required to take one on going to sea; nor shall any vessel be required to take a pilot that has to enter the harbor in distress.

1899, c. 9, ss. 7, 8; 1901, c. 439.

2148. Vessel under sixty tons not liable for pilot. No pilot, acting under the authority of the commissioners of navigation for Old Topsail inlet, shall be entitled to pilotage for any vessel under sixty tons burden, unless such vessel shall have given a signal for a pilot, or otherwise shall have required the assistance of a pilot.

Code, s. 3523; R. C., c. 85, s. 33; 1801, c. 600, s. 3; 1806, c. 711, s. 1.

IV. PILOTS, BOGUE INLET.

2149. Commissioners of navigation for Bogue inlet. The board of commissioners of the county of Onslow shall, if not already done, appoint five commissioners of navigation for Bogue inlet and its waters. And when vacancies occur in said board, by refusal to act, by resignation or otherwise, the remaining members of such board shall fill the same until the same be supplied by the appointing board, which is directed to be done at the first meeting after the vacancy occurs. And the said board shall have the same powers and authority as to pilots and pilotage as the commissioners for Old Topsail inlet and Beaufort harbor.

Code, s. 3515; R. C., c. 85, s. 25; 1783, c. 194; 1784, c. 208, s. 2; 1879, c. 216, s. 4.

2150. Rates of pilotage. The branch pilots for Bogue inlet shall be entitled to receive of the commander of such vessel as they may have charge of, the following pilotage, namely: For bringing any vessel into the said inlet, drawing less than seven feet, from the outside of the bar to the anchorage before the town, or the customary place in Hill's channel, one dollar per foot; for a vessel drawing more than seven feet, one dollar and fifty cents per foot; and the same fees for pilotage outward as inward.

Code, s. 3535; 1889, c. 121.

V. PILOTS, GENERAL PROVISIONS.

2151. Pilots to have spyglasses. Every pilot, within such convenient time as the commissioners may direct, who have control over the waters within which he acts, shall furnish himself with a good

telescope or spyglass, under the penalty of fifty dollars, to be paid to the commissioners.

Code, s. 3517; R. C., c. 85, s. 27; 1790, c. 320, s. 3.

2152. Penalty for acting as pilot without license. If any person shall presume to act as pilot, who is not qualified and licensed in the manner herein prescribed, he shall forfeit and pay, for the use of the commissioners, forty dollars for every attempt at piloting: Provided, that should there be no pilot in attendance, any person may conduct into port any vessel in danger from stress of weather, or in a leaky condition.

Code, s. 3519; R. C., c. 85, s. 29; 1783, c. 194, s. 3; 1784, c. 208, s. 4.

2153. Penalty on pilot neglecting to go to vessel having signal set. When any pilot shall see any vessel on the coast, having a signal for a pilot, or shall hear a gun of distress fired off the coast, and shall neglect or refuse to go to the assistance of such vessel, such pilot shall forfeit and pay one hundred dollars, to be recovered in the name of the state, one-half to the use of the informer, and the other half to the master of the vessel; unless such pilot is then actually in charge of another vessel.

Code, s. 3521; R. C., c. 85, s. 31; 1784, c. 207, s. 10; 1790, c. 320, s. 2; 1783, c. 194, s. 6.

2154. Pilots may be removed. Whenever any pilot appointed by any board by this chapter authorized to appoint or license shall, on trial, be found to be incompetent, or shall be guilty of improper conduct by intoxication or otherwise, or of any misbehavior in his office, or shall absent himself from the state for a period of six months, the pilot so offending may be removed from his office by the board of commissioners under whose authority he is acting, by a notice to him in writing; and if after such removal he shall attempt to take charge of any vessel, he shall forfeit and pay two hundred dollars for the use of said board. And it shall be the duty of the board to put up a written notice of the removal, in the public places within the port, or publish it in some convenient newspaper. But no pilot for the navigation of Hatteras inlet shall be required to surrender or forfeit his branch by reason of absence from the state for a period less than six months.

Code, ss. 3518, 3490; 1869-70, c. 235, s. 7; 1881, c. 261, s. 2; R. C., c. 85, s. 28; R. S., c. 88, ss. 7, 31, 35; 1784, c. 207, s. 4; 1819, c. 1025, s. 4; 1800, c. 565; 1876-7, c. 22; 1881, c. 261, s. 1.

2155. Pay for detention; when driven off coast. If the master of any vessel shall send for or take on board any pilot to conduct his vessel from her station to any other place, and shall afterwards neglect or delay to remove such vessel (wind and weather permit-

ting), he shall pay to the pilot two dollars for attending each day he shall be so detained; and if any vessel, which shall be boarded by a pilot, without or within any of the inlets, shall by violence of the weather or otherwise be driven to sea, the master or owner of such vessel shall allow and pay the pilot two dollars per day for every day he shall be on board, besides the fees of pilotage.

Code, s. 3520; R. C., c. 85, s. 30; 1783, c. 194, s. 5; 1784, c. 207, s. 6.

2156. Pilots refused, entitled to pay. If a branch pilot shall go off to any vessel bound in, and offer to pilot her over the bar, the master or commander of such vessel, if he refuses to take such pilot, shall pay to such pilot, if not previously furnished with one, the same sum as is allowed by law for conducting such vessel in, to be recovered before a justice of the peace, if the sum be within his jurisdiction: Provided, that the first pilot, and no other, who shall speak such vessel so bound in shall be entitled to the pay provided for in this section.

Code, s. 3522; R. C., c. 85, s. 32; 1871-2, c. 117.

2157. Pay of pilots when detained by vessel. Every master of a vessel who shall detain a pilot at the time appointed, so that he can not proceed to sea, though wind and weather should permit, shall pay to such pilot three dollars per day during the time of his actual detention.

Code, s. 3495; 1858-9, c. 23, s. 7.

2158. Rates of pilotage annexed to commission. The commissioners of navigation for the several ports of this state shall annex to the branch or commission, by them given to each pilot, a copy of the fees to which such pilot is entitled.

Code, ss. 3497, 3536; R. C., c. 85, ss. 9, 38; 1784, c. 208, s. 4; 1796, c. 470, s. 5.

2159. Harbor-masters, how appointed. The several boards of commissioners of navigation may appoint a harbor-master for their respective ports. They shall appoint a clerk to keep books, in which shall be recorded all their proceedings.

Code, s. 3525; R. C., c. 85, s. 35.

2160. Commissioners of navigation to designate place where trash may be put. The several boards of commissioners established by this chapter may, subject to such regulations as the United States may make, designate the places whereat, within the waters under their several and respective control, may be cast and thrown ballast, trash, stone and like matter.

Code, s. 3537; R. C., c. 85, s. 40; R. S., c. 88, ss. 23, 24, 45; 1833, c. 146, ss. 1, 2, 3; 1846, c. 60, s. 3.

2161. Harbor-master, how appointed where no board of navigation. Where no board of navigation exists the governing body of any incorporated town, situated on any navigable water-course, shall have power to appoint a harbor-master for the port, who shall have the same power and authority in their respective ports as the harbor-master of Wilmington is by this chapter given for that port, and shall receive like fees and no others.

CHAPTER 56.

NEGOTIABLE INSTRUMENTS.

| | Sections. |
|--------------------------------------|-----------|
| I. Requirements for negotiability, | 2162—2171 |
| II. Date, | 2172—2174 |
| III. Incomplete, | 2175—2177 |
| IV. Signature, | 2178—2182 |
| V. Consideration, | 2183—2188 |
| VI. Indorsement, | 2189—2210 |
| VII. Rights of holder, | 2211—2219 |
| VIII. Liability of parties, | 2220—2229 |
| IX. Presentment for payment, | 2230—2249 |
| X. Notice of dishonor, | 2250—2279 |
| XI. Discharge of, | 2280—2286 |
| XII. Bills, form and interpretation, | 2287—2292 |
| XIII. Acceptance, | 2293—2303 |
| XIV. Presentment for acceptance, | 2304—2312 |
| XV. Protest, | 2313—2321 |
| XVI. Acceptance for honor, | 2322—2331 |
| XVII. Payment for honor, | 2332—2338 |
| XVIII. Bills in a set, | 2339—2344 |
| XIX. Promissory notes and checks. | 2345—2350 |
| XX. General provisions. | 2351—2356 |

I. REQUIREMENTS FOR NEGOTIABILITY.

2162. What to contain. An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to the order of a specified person or to bearer; and (5) where the instrument is addressed to a drawee, he must be named, or otherwise indicated therein with reasonable certainty.

1899, c. 733, s. 1.

2163. What constitutes a sum certain. The sum payable is a sum certain within the meaning of this chapter, although it is to be paid (1) with interest; or (2) by stated installments; or (3) by stated installments with a provision that upon default in payment of any installment the whole shall become due; or (4) with exchange, whether at a fixed rate or at the current rate; or (5) with costs of collection or an attorney's fee in case payment shall not be made at maturity.

1899, c. 733, s. 2.

2164. What promise unconditional. An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional.

1899, c. 733, s. 3.

2165. Additional promise makes non-negotiable; exceptions. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal.

1899, c. 733, s. 5.

2166. Things which do not affect. The validity and negotiable character of an instrument are not affected by the fact that (1) it is not dated; or (2) does not specify the value given, or that any value has been given therefor; or (3) does not specify the place where it is drawn or the place where it is payable; or (4) bears a seal; or (5) designates a particular kind of current money in which payment is to be made. But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

1899, c. 733, s. 6.

2167. What is a determinable future time. An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable (1) at a fixed period after

date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

1899, c. 733, s. 4.

2168. When payable on demand. An instrument is payable on demand: (1) when it is expressed to be payable on demand, or at sight or on presentation; or (2) in which no time for payment is expressed. Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

1899, c. 733, s. 7.

2169. What are payable to order. The instrument is payable to order when it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of: (1) a payee who is not maker, drawer or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or some of several payees, or (6) the holder of an office for the time being. When the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

1899, c. 733, s. 8.

2170. What are payable to bearer. The instrument is payable to bearer: (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or to bearer; or (3) when it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last indorsement is an indorsement in blank.

1899, c. 733, s. 9.

2171. No formal language required. The negotiable instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

1899, c. 733, s. 10.

II. DATE.

2172. Prima facie true. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

1899, c. 733, s. 11.

2173. Incorrect, does not invalidate. The instrument is not invalid for the reason only that it is antedated or post-dated, provided that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered, acquires the title thereto as of the date of delivery.

1899, c. 733, s. 12.

2174. Holder may insert. When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him the date so inserted is to be regarded as the true date.

1899, c. 733, s. 13.

III. INCOMPLETE.

2175. Blanks may be filled by holder. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

1899, c. 733, s. 14.

2176. Not valid unless delivered. Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery.

1899, c. 733, s. 15.

2177. Revocable until delivery. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due

course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

1899, c. 733, s. 16.

IV. SIGNATURE.

2178. No liability without. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

1899, c. 733, s. 18.

2179. May be made by agent. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency.

1899, c. 733, s. 19.

2180. Effect of signing as agent. Where the instrument contains, or a person adds to his signature, words indicating that he signed for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

1899, c. 733, s. 20.

2181. Effect of, by procuration. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent so signing acted within the actual limits of his authority.

1899, c. 733, s. 21.

2182. Forgery of, renders wholly inoperative. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative and no right to retain the instrument or to give a discharge therefor or to enforce payment

thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

1899, c. 733, s. 23.

V. CONSIDERATION.

2183. Valuable, presumed. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

1899, c. 733, s. 24.

2184. What constitutes value. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value and is deemed such whether the instrument is payable on demand or at a future time.

1899, c. 733, s. 25.

2185. Holder deemed holder for value when value given. Where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time.

1899, c. 733, s. 26.

2186. Holder of lien, holder for value to extent of lien. Where the holder has a lien on the instrument arising either from contract or by implication of law he is deemed a holder for value to the extent of his lien.

1899, c. 733, s. 27.

2187. Absence or failure of, as defense. Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

1899, c. 733, s. 28.

2188. Accommodation party, who is; liability. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

1899, c. 733, s. 29.

VI. INDORSEMENT.

2189. What is negotiation. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, and completed by delivery.

1899, c. 733, s. 30.

2190. How made. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

1899, c. 733, s. 31.

2191. Effect of, by corporations and infants. The indorsement or assignment of the instrument by a corporation, an infant, or married woman passes the property therein, notwithstanding that from want of capacity the corporation, infant, or married woman may incur no liability thereon.

1899, c. 733, s. 22.

2192. Must be of entire instrument. An indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue.

1899, c. 733, s. 32.

2193. Kinds of. An indorsement may be either in blank or special, and it may also be either restrictive or qualified or conditional.

1899, c. 733, s. 33.

2194. Special, defined; in blank. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery.

1899, c. 733, s. 34.

2195. Holder may convert blank to special. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

1899, c. 733, s. 35.

2196. Restrictive, defined. An indorsement is restrictive, which either: (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

1899, c. 733, s. 36.

2197. Restrictive, confers what rights. A restrictive indorsement confers upon the indorsee the right: (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

1899, c. 733, s. 37.

2198. Qualified, constitutes indorser a mere assignor of title. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

1899, c. 733, s. 38.

2199. Conditional, effect of. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally.

1899, c. 733, s. 39.

2200. Effect of special, instrument payable to bearer. Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

1899, c. 733, s. 40.

2201. By two or more payees. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others.

1899, c. 733, s. 41.

2202. Payable to cashier or other fiscal officer, payable to corporation. Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.

1899, c. 733, s. 42.

2203. Name of payee wrong, how indorsed. Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as there described, adding, if he think fit, his proper signature.

1899, c. 733, s. 43.

2204. Indorser in representative capacity may negative personal liability. Where any person is under obligation to indorse in a representative capacity he may indorse in such terms as to negative personal liability.

1899, c. 733, s. 44.

2205. Undated, presumed, before due. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

1899, c. 733, s. 45.

2206. Presumed made at place of date of instrument. Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

1899, c. 733, s. 46.

2207. Once negotiable, continues so till discharged. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

1899, c. 733, s. 47.

2208. Holder may strike out; effect of. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out and all indorsers subsequent to him are thereby relieved from liability on the instrument.

1899, c. 733, s. 48.

2209. Transfer without, makes non-negotiable till indorsed. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires

in addition the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

1899, c. 733, s. 49.

2210. Negotiation back to prior party releases intermediate parties. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

1899, c. 733, s. 50.

VII. RIGHTS OF HOLDER.

2211. May sue in his own name. The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument.

1899, c. 733, s. 51.

2212. What constitutes holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

1899, c. 733, s. 52.

2213. Delay in presenting when on demand. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

1899, c. 733, s. 53.

2214. Effect of notice of infirmity. Where the transferee received notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

1899, c. 733, s. 54.

2215. Fraud, duress or force in obtaining, makes title void. The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear or other

unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud.

1899, c. 733, s. 55.

2216. Actual knowledge necessary to constitute notice of infirmity. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

1899, c. 733, s. 56.

2217. Free from defect, in title of prior parties. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

1899, c. 733, s. 57.

2218. Holds as non-negotiable, when. In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument has all the rights of such former holder in respect of all parties prior to the latter.

1899, c. 733, s. 58.

2219. Deemed prima facie in due course. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

1899, c. 733, s. 59.

VIII. LIABILITY OF PARTIES.

2220. Maker's admissions and engagements. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

1899, c. 733, s. 60.

2221. Drawer's admissions and engagements. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

1899, c. 733, s. 61.

2222. Acceptor's engagements. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse.

1899, c. 733, s. 62.

2223. Who deemed indorsers. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

1899, c. 733, s. 63.

2224. Signing in blank, liable as indorser. Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties; (2) if the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer; (3) if he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

1899, c. 733, s. 64.

2225. Delivery or qualified indorsement warrants what. Every person negotiating an instrument by delivery or by a qualified indorsement warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of

this section do not apply to persons negotiating public or corporate securities other than bills and notes.

1899, c. 733, s. 65.

2226. Indorser without qualification warrants what. Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions one, two and three of the next preceding section; and (2) that the instrument is at the time of his indorsement valid and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.

1899, c. 733, s. 66.

2227. Indorser of instrument negotiable by delivery. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

1899, c. 733, s. 67.

2228. In order of their indorsement. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorseees who indorse are deemed to indorse jointly and severally.

1899, c. 733, s. 68.

2229. Broker or agent negotiating without indorsement. Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section two thousand two hundred and twenty-five, unless he discloses the name of his principal and the fact that he is acting only as agent.

1899, c. 733, s. 69.

IX. PRESENTMENT FOR PAYMENT.

2230. When necessary; when not. Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

1899, c. 733, s. 70.

2231. At what time. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

1899, c. 733, s. 71.

2232. How made. Presentment for payment to be sufficient must be made (1) by the holder or by some person authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made.

1899, c. 733, s. 72.

2233. Proper place for. Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presented; (2) where no place of payment is specified but the address of the person to make the payment is given in the instrument, and is there presented; (3) where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

1899, c. 733, s. 73.

2234. Instrument exhibited to party, delivered when paid. The instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it.

1899, c. 733, s. 74.

2235. Payable at bank, how made. Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

1899, c. 733, s. 75.

2236. When made to personal representative. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found.

1899, c. 733, s. 76.

2237. How made to partners. Where the persons primarily liable on the instrument are liable as partners and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

1899, c. 733, s. 77.

2238. To persons severally liable. Where there are several persons not parties primarily liable on the instrument and no place of payment is specified, presentment must be made to them all.

1899, c. 733, s. 78.

2239. When not required to charge drawer. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

1899, c. 733, s. 79.

2240. Not required to charge indorser, when. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

1899, c. 733, s. 80.

2241. Delay in making, when excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

1899, c. 733, s. 81.

2242. Dispensed with, when. Presentment for payment is dispensed with (1) where after the exercise of reasonable diligence presentment as required by this chapter can not be made; (2) where the drawee is a fictitious person; (3) by waiver of presentment, express or implied.

1899, c. 733, s. 82.

2243. What constitutes. The instrument is dishonored by non-payment when (1) it is duly presented for payment and payment is refused or can not be obtained; or (2) presentment is excused and the instrument is overdue and unpaid.

1899, c. 733, s. 83.

2244. Dishonor gives right of action against those secondarily liable. Subject to the provisions of this chapter, when the instrument

is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

1899, c. 733, s. 84.

2245. When negotiable instruments payable. Every negotiable instrument is payable at the time fixed therein with grace as allowed by the succeeding section. When the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day. Instruments falling due on Saturday, when it is a holiday, are to be presented for payment on the next succeeding business day, except that instruments payable on demand may at the option of the holder be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday.

1899, c. 733, s. 85.

2246. Days of grace, what allowed. All bills of exchange payable within the state, at sight, or at a future day certain, in which there is no express stipulation to the contrary, shall be entitled to days of grace as the same are allowed by the custom of merchants on foreign bills of exchange payable at the expiration of a certain period after date or sight: Provided, that no days of grace shall be allowed on any bill of exchange, promissory note, or draft payable on demand.

Code, s. 43.

2247. Time, how computed. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.

1899, c. 733, s. 86.

2248. Instrument payable at bank is an order to bank to pay. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

1899, c. 733, s. 87.

2249. Payment in due course, what is. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

1899, c. 733, s. 88.

X. NOTICE OF DISHONOR.

2250. Effect of failure to give. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

1899, c. 733, s. 89.

2251. By whom given. The notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom notice is given.

1899, c. 733, s. 90.

2252. May be given by agent. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

1899, c. 733, s. 91.

2253. Who benefited by holder's notice. Where notice is given by or on behalf of the holder, it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

1899, c. 733, s. 92.

2254. Given by a party inures to benefit of holder and subsequent parties. Where notice is given by or on behalf of a party entitled to give notice it inures to the benefit of the holder and all parties subsequent to the party by whom notice is given.

1899, c. 733, s. 93.

2255. Agent may give to principal or parties. Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

1899, c. 733, s. 94.

2256. Defects of, not to invalidate unless party misled. A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate unless the party to whom the notice is given is in fact misled thereby.

1899, c. 733, s. 95.

2257. Terms of, may be oral or written. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails.

1899, c. 733, s. 96.

2258. May be given to party or agent. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

1899, c. 733, s. 97.

2259. When given to personal representative. When any party is dead and his death is known to the party giving notice, the notice must be given to a personal representative if there be one, and if with reasonable diligence he can be found. If there is no personal representative, notice may be sent to the last residence or last place of business of the deceased.

1899, c. 733, s. 98.

2260. To partner for firm. When the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

1899, c. 733, s. 99.

2261. Joint parties, each notified. Notice to joint parties who are not partners must be given to each of them unless one of them has authority to receive such notice for the others.

1899, c. 733, s. 100.

2262. To trustee in bankruptcy, etc. Where a party has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee.

1899, c. 733, s. 101.

2263. At what time given. Notice may be given as soon as the instrument is dishonored, and, unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter.

1899, c. 733, s. 102.

2264. When given to persons residing in same place. When the person giving and the person to receive notice reside in same place notice must be given within the following times: (1) If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following; (2) if given at his residence it must be given before the usual hours of rest on the day following; (3) if sent by mail it must be deposited in the

postoffice in time to reach him in the usual course on the day following.

1899, c. 733, s. 103.

2265. When given by mail. Where the person giving and the person to receive notice reside in different places the notice must be given within the following times: (1) If sent by mail it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; (2) if given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail if it had been deposited in the postoffice within the time specified in the last subdivision.

1899, c. 733, s. 104.

2266. Duly mailed, deemed given. Where notice of dishonor is duly addressed and deposited in the postoffice the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

1899, c. 733, s. 105.

2267. When deemed mailed. Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter-box under the control of the postoffice department.

1899, c. 733, s. 106.

2268. When given to antecedent parties. Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

1899, c. 733, s. 107.

2269. Where to be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: (1) Either to the postoffice nearest to his place of residence or to the postoffice where he is accustomed to receive his letters; or (2) if he lives in one place and have his place of business in another, notice may be sent to either place; or (3) if he is sojourning in another place notice may be sent to the place where he is so sojourning. But where the notice is actually received by the party within the time specified in this chapter it will be sufficient, though not sent in accordance with requirements of this section.

1899, c. 733, s. 108.

2270. May be waived. Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied.

1899, c. 733, s. 109.

2271. Waiver embodied in instrument binds all parties. Where the waiver is embodied in the instrument itself it is binding upon all parties, but where it is written above the signature of an indorser it binds him only.

1899, c. 733, s. 110.

2272. Unnecessary when protest waived. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest but also of a presentment and notice of dishonor.

1899, c. 733, s. 111.

2273. Dispensed with, when. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged.

1899, c. 733, s. 112.

2274. Delay in giving, excused, when. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

1899, c. 733, s. 113.

2275. Not required, when. Notice of dishonor is not required to be given to the drawer in either of the following cases: (1) Where the drawer and the drawee are the same person; (2) where the drawee is a fictitious person or a person not having capacity to contract; (3) where the drawer is the person to whom the instrument is presented for payment; (4) where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; (5) where the drawer has countermanded payment.

1899, c. 733, s. 114.

2276. To indorser, not required, when. Notice of dishonor is not required to be given to an indorser in either of the following cases: (1) Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument; (2) where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation.

1899, c. 733, s. 115.

2277. Notice of nonacceptance makes unnecessary. Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary unless in the meantime the instrument has been accepted.

1899, c. 733, s. 116.

2278. Effect of failure to give notice of nonacceptance. An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission.

1899, c. 733, s. 117.

2279. Protest not required, except of foreign bills of exchange. Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be, but protest is not required except in the case of foreign bills of exchange.

1899, c. 733, s. 118.

XI. DISCHARGE OF.

2280. What constitutes. A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right.

1899, c. 733, s. 119.

2281. When one secondarily liable discharged. A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved.

1899, c. 733, s. 120.

2282. Payment by party secondarily liable is not. When the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of the third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated.

1899, c. 733, s. 121.

2283. Holder may renounce in writing his rights against any party. The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

1899, c. 733, s. 122.

2284. Cancellation by mistake inoperative. A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative, but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority.

1899, c. 733, s. 123.

2285. Material alteration without assent avoids. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration he may enforce payment thereof according to its original tenor.

1899, c. 733, s. 124.

2286. Material alteration defined. Any alteration which changes (1) the date; (2) the sum payable either for principal or interest; (3) the time or place of payment; (4) the number or the relation of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

1899, c. 733, s. 125.

XII. BILLS, FORM AND INTERPRETATION.

2287. Bills defined. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

1899, c. 733, s. 126.

2288. Not assignment of fund. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

1899, c. 733, s. 127.

2289. May be addressed to two or more drawees jointly but not in alternative. A bill may be addressed to two or more drawees jointly, whether they are partners or not, but not to two or more drawees in the alternative or in succession.

1899, c. 733, s. 128.

2290. Inland bill defined. An inland bill of exchange is a bill which is or on its face purports to be both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill the holder may treat it as an inland bill.

1899, c. 733, s. 129.

2291. When holder may treat as bill or note. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument at his option, either as a bill of exchange or a promissory note.

1899, c. 733, s. 130.

2292. Referee in case of need. The drawer of a bill and any endorser may insert thereon the name of a person to whom the holder may resort in case of need: that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

1899, c. 733, s. 131.

XIII. ACCEPTANCE.

2293. Defined. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawer. It must not express that the drawee will perform his promise by any other means than the payment of money.

1899, c. 733, s. 132.

2294. Must be written on bill. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

1899, c. 733, s. 133.

2295. Effect of, on paper other than bill. Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

1899, c. 733, s. 134.

2296. Unconditional promise in writing to accept valid, when. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

1899, c. 733, s. 135.

2297. Twenty-four hours allowed drawee to accept. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation.

1899, c. 733, s. 136.

2298. Destruction of, or failure to return, bill deemed acceptance. Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same.

1899, c. 733, s. 137.

2299. May be accepted before signed, when overdue, etc. A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

1899, c. 733, s. 138.

2300. Generally and qualified. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

1899, c. 733, s. 139.

2301. What is general. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

1899, c. 733, s. 140.

2302. What is qualified. An acceptance is qualified which is (1) conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; (2) partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (3) local; that is to say, an acceptance to pay only at a particular place; (4) qualified as to time; (5) the acceptance of some one or more of the drawees, but not of all.

1899, c. 733, s. 141.

2303. Holder may refuse qualified acceptance and treat bill as dishonored. The holder may refuse to take a qualified acceptance; and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance. When a qualified acceptance is taken the drawer and endorsers are discharged from liability on the bill unless they have expressly or impliedly authorized the holder to take a qualified acceptance or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must, within a reasonable time, express his dissent to the holder or he will be deemed to have assented thereto.

1899, c. 733, s. 142.

XIV. PRESENTMENT FOR ACCEPTANCE.

2304. Necessary, in what cases. Presentment for acceptance must be made (1) where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) where the bill expressly stipulates that it shall be presented for acceptance; or (3) where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

1899, c. 733, s. 143.

2305. Failure to present in reasonable time discharges drawee and indorsers. Except as herein otherwise provided the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so the drawee and all indorsers are discharged.

1899, c. 733, s. 144.

2306. How made. Presentment for acceptance must be made by or on behalf of the holder, at a reasonable hour on a business day and before the bill is overdue, to the drawer or some person authorized to accept or refuse acceptance on his behalf; and (1) where a

bill is addressed to two or more drawees who are not partners, presentment must be made to them all unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only; (2) where the drawee is dead presentment may be made to his personal representative; (3) where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors presentment may be made to him or to his trustee or assignee.

1899, c. 733, s. 145.

2307. On what day presented. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of this chapter. When Saturday is not a holiday presentment for acceptance may be made before twelve o'clock noon on that day.

1899, c. 733, s. 146.

2308. Excused, when; can not be made before due. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

1899, c. 733, s. 147.

2309. Excused and bill treated as dishonored. Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases: (1) Where the drawee is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill; (2) where after the exercise of reasonable diligence presentment can not be made; (3) where, although presentment has been irregular, acceptance has been refused on some ground.

1899, c. 733, s. 148.

2310. When bill dishonored by nonacceptance. A bill is dishonored by nonacceptance (1) when it is duly presented for acceptance and such an acceptance as is prescribed in this chapter is refused or can not be obtained; or (2) when a presentment for acceptance is executed and the bill is not accepted.

1899, c. 733, s. 149.

2311. When bill must be treated as dishonored. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored.

ored by nonacceptance or he loses the right of recourse against the drawer and indorsers.

1899, c. 733, s. 150.

2312. Bill dishonored by nonacceptance, holder has recourse on drawer and indorsers. When a bill is dishonored by nonacceptance an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

1899, c. 733, s. 151.

XV. PROTEST.

2313. Necessary only on foreign bills. Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill which had not previously been dishonored by nonacceptance is dishonored by nonpayment it must be duly protested for nonpayment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill protest in case of dishonor is unnecessary.

1899, c. 733, s. 152.

2314. Annexed to bill, specifies what. The protest must be annexed to the bill or must contain a copy thereof and must be under the hand and seal of the notary making it, and must specify (1) the time and place of presentment; (2) the fact that presentment was made and the manner thereof; (3) the cause or reason for protesting the bill; (4) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

1899, c. 733, s. 153.

2315. By whom made. Protest may be made by (1) a notary public; or (2) by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

1899, c. 733, s. 154.

2316. Must be made on day of dishonor. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting.

1899, c. 733, s. 155.

2317. At what place made. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than

the drawee has been dishonored by nonacceptance it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary.

1899, c. 733, s. 156.

2318. For nonpayment, after, for nonacceptance. A bill which has been protested for nonacceptance may be subsequently protested for nonpayment.

1899, c. 733, s. 157.

2319. Before maturity, in bankruptcy, etc. Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

1899, c. 733, s. 158.

2320. Dispensed with, when. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

1899, c. 733, s. 159.

2321. On copy of lost bill. Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

1899, c. 733, s. 160.

XVI. ACCEPTANCE FOR HONOR.

2322. When may be made. Where a bill of exchange has been protested for dishonor by nonacceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party.

1899, c. 733, s. 161.

2323. How made. An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

1899, c. 733, s. 162.

2324. Deemed for honor of drawer. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

1899, c. 733, s. 163.

2325. Liability on. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

1899, c. 733, s. 164.

2326. Liable, when. The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee; and provided also, that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him.

1899, c. 733, s. 165.

2327. Maturity, how calculated. Where a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor.

1899, c. 733, s. 166.

2328. Protest before presentment to acceptor. Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need.

1899, c. 733, s. 167.

2329. How presented for payment. Presentment for payment to the acceptor for honor must be made as follows: (1) If it is to be presented in the place where the protest for nonpayment was made it must be presented not later than the day following its maturity; (2) if it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time in this chapter specified.

1899, c. 733, s. 168.

2330. Delay in presenting to acceptor for honor or referee in case of need excused, when. The provisions of section two thou-

sand two hundred and forty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

1899, c. 733, s. 169.

2331. Protest when not paid by acceptor. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

1899, c. 733, s. 170.

XVII. PAYMENT FOR HONOR.

2332. After protest. Where a bill has been protested for non-payment any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

1899, c. 733, s. 171.

2333. Must be attested by notarial act of honor. The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

1899, c. 733, s. 172.

2334. Notarial act of honor, on what founded. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

1899, c. 733, s. 173.

2335. Who given preference in. Where two or more persons offer to pay a bill for the honor of different parties the person whose payment will discharge most parties to the bill is to be given the preference.

1899, c. 733, s. 174.

2336. Discharges all subsequent parties. Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

1899, c. 733, s. 175.

2337. Refusing payment forfeits rights. Where the holder of a bill refuses to receive payment *supra* protest he loses his right of recourse against any party who would have been discharged by such payment.

1899, c. 733, s. 176.

2338. Payer for honor entitled to bill and protest. The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor is entitled to receive both the bill itself and the protest.

1899, c. 733, s. 177.

XVIII. BILLS IN A SET.

2339. Constitute one bill. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

1899, c. 733, s. 178.

2340. Two or more parts negotiated, holder whose title first accrues owner. Where two or more parts of a set are negotiated to different holders in due course the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

1899, c. 733, s. 179.

2341. Indorser liable for all he indorses. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if such parts were separate bills.

1899, c. 733, s. 180.

2342. Acceptor liable for all he accepts. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part and such accepted parts are negotiated to different holders in due course he is liable on every such part as if it were a separate bill.

1899, c. 733, s. 181.

2343. Payment of part does not release from outstanding accepted part. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

1899, c. 733, s. 182.

2344. Payment of one part discharges whole, when. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

1899, c. 733, s. 183.

XIX. PROMISSORY NOTES AND CHECKS.

2345. Negotiable promissory note defined. A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order it is not complete until indorsed by him.

1899, c. 733, s. 184.

2346. Check defined, law governing. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided the provisions of this chapter are applicable to a bill of exchange payable on demand apply to a check.

1899, c. 733, s. 185.

2347. Failure to present in reasonable time discharges drawer. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

1899, c. 733, s. 186.

2348. Certification of check an acceptance. Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

1899, c. 733, s. 187.

2349. Certification discharges drawer and indorsers. Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

1899, c. 733, s. 188.

2350. Check not assignment of funds. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.

1899, c. 733, s. 189.

XX. GENERAL PROVISIONS.

2351. Terms defined. In this chapter, unless the context otherwise requires—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counterclaim and setoff.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

1899, c. 733, s. 191.

2352. Rules of construction. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument is not dated it will be considered to be dated as of the time it was issued.

3. Where there is conflict between the written and printed provisions of the instrument the written provisions prevail.

4. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note the holder may treat it as either at his election.

5. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

6. Where an instrument containing the words “I promise to pay” is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

1899, c. 733, s. 17.

2353. Who primarily and secondarily liable. The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable.

1899, c. 733, s. 192.

2354. Reasonable time determined by usage. In determining what is reasonable time or an unreasonable time regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments and the facts of the particular case.

1899, c. 733, s. 193.

2355. Law merchant applicable. In any case not provided for in this chapter the rules of the law merchant shall govern.

1899, c. 733, s. 196.

2356. This chapter not to authorize certain things. Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this chapter; but the mention of such provisions in such instruments shall not affect the other terms of such instruments or the negotiability thereof.

1899, c. 733, s. 197.

NOTE. Instruments falling due on Sunday or holidays, see Sunday and Holidays.

From what time interest to run, see Interest, s. 1932.

CHAPTER 57.

NOTARIES.

(Sections 2357—2363.)

2357. Appointed by governor; qualified before clerk. The governor may, from time to time, at his discretion, appoint one or more fit persons in every county, to act as notaries, who shall hold their office for two years from and after the date of their appointment; and on exhibiting their commission to the clerk of the superior court of the county in which they are to act, shall be duly qualified, by taking before said clerk an oath of office, and the oaths prescribed for officers.

Code, s 3304; R. C., c. 75; 1777, c. 118, s. 15; 1881, c. 317.

2358. Commission; record of qualification by clerk. The governor shall issue to each a commission, a certificate of which shall

be deposited with the clerk of the court, and filed among the records, and he shall note on his minutes the qualification of the notary.

Code, s. 3305; R. C., c. 75, s. 2.

2359. Clerks notaries ex officio; may certify own seals. The clerks of the superior court may act as notaries public, in their several counties, by virtue of their office as clerks, and may certify their notarial acts under the seals of their respective courts.

Code, s. 3306; R. C., c. 75, s. 3; 1833, c. 7, ss. 1, 2.

2360. May take probates, administer oaths, etc. Notaries public, in and out of the state, shall have power to take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instrument of writing, to take depositions and to administer oaths and affirmations in matters incident or belonging to the duties of their office, and to take affidavits to be used before a court, judge or other officer, within the state, and shall have power to take the privy examination of *femes covert*.

Code, s. 3307; 1866, c. 30; 1879, c. 128.

2361. May exercise power in other than own county. Notaries shall have full power and authority to perform the functions of their office in any and all counties of the state, and full faith and credit shall be given to any of their official acts wheresoever the same shall be made and done.

1891, c. 248.

2362. Must state expiration of commission. Notaries shall state after each official signature by them the date of the expiration of their commissions; but the failure to do so shall not thereby invalidate their official acts.

2363. Seal. Official acts by notaries shall be attested by their notarial seals.

CHAPTER 58.

OATHS.

(Sections 2364--2374.)

2364. Oaths administered with solemnity. Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity.

2365. How administered. Judges and justices of the peace, and other persons who may be empowered to administer oaths, shall (except in the cases in this chapter excepted) require the party sworn, to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token, that, if he should swerve from the truth, he may be justly deprived of all the blessing of the Gospel, and made liable to that vengeance which he has imprecated on his own head; and he shall kiss the Holy Gospel, as a seal of confirmation to the said engagements.

Code, s. 3309; R. C., c. 76, s. 1; 1777, c. 108, s. 2.

2366. Who may be sworn with uplifted hand; form of affirmation. When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also, in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely:

I, A. B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known, (etc., as the words of the oath may be).

Code, s. 3310; R. C., c. 76, s. 2; 1777, c. 108, s. 3.

2367. How Quakers, Moravians, etc., affirm. The solemn affirmation of Quakers, Moravians, Dunkers and Mennonists, made in

the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions; and in all cases where they are required to take an oath to support the constitution of the state, or of the United States, or an oath of office, they shall make their solemn affirmation in the words of the oath beginning after the word "swear;" which affirmation shall be effectual to all intents and purposes.

Code, s. 3311; R. C., c. 76, s. 3; 1777, c. 108, s. 4; 1777, c. 115, s. 42; 1819, c. 1019; 1821, c. 1112.

2368. Oath to support constitution of United States; form of; all officers to take. All members of the general assembly, and all officers who shall be elected or appointed to any office of trust or profit within the state, shall, agreeably to act of congress, take the following oath or affirmation:

I, A. B., do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States; so help me. God.

Which oath shall be taken before they enter upon the execution of the duties of the office.

Code, s. 3313; R. C., c. 76, s. 5; 1791, c. 342, s. 2.

2369. Oath or affirmation to support constitution; form of; taken by all officers. Every member of the general assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the state, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation:

I, A. B., do solemnly and sincerely swear (or affirm) that I will be faithful and bear true allegiance to the state of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the constitution of said state, not inconsistent with the constitution of the United States, to the best of my knowledge and ability; so help me, God.

Where such person shall be of the people called Quakers, Moravians, Mennonists or Dunkers, he shall take and subscribe the following affirmation:

I, A. B., do solemnly and sincerely declare and affirm that I will truly and faithfully demean myself as a peaceful citizen of North Carolina; that I will be subject to the powers and authorities that are or may be established for the good government thereof, not inconsistent with the constitution of the state and the constitution of the United States, either by yielding an active or passive obedience thereto, and that I will not abet or join the enemies of the state, by any means, in any conspiracy whatever, against the state; that I will disclose and make known to the legislative, executive or judicial powers of the state all treasonable conspiracies which I shall know to be made or intended against the state.

Code, s. 3312; R. C., c. 76, s. 4; 1781, c. 342, s. 1.

2370. When deputies may administer. In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging such duties, shall have authority to administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing.

Code, s. 3316; R. C., c. 76, s. 7; 1836, c. 27, s. 2.

2371. Oaths of sundry persons, forms of. The oaths of office to be taken by the several persons hereafter named, shall be in the words following the names of said persons respectively:

ADMINISTRATOR.

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability: so help you, God.

ATTORNEY AT LAW.

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

ATTORNEY GENERAL, STATE SOLICITORS AND COUNTY ATTORNEYS.

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of attorney general (solicitor for the State or attorney for the state in the county of); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

AUDITOR.

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

BOOK DEBT OATH.

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

BOOK DEBT OATH FOR ADMINISTRATOR.

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

CLERK OF THE SUPREME COURT.

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will give, to any person whatsoever, any gratuity, gift, fee or reward, in consideration of my appointment to the office of clerk of the supreme court of North Carolina; nor have I sold, or offered to sell, nor will I sell, or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in this State; I do further swear that I will execute the office of clerk of the supreme court without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

CLERK OF THE SUPERIOR COURT.

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of.....; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the state; and I do further swear that I will execute the office of clerk of the superior court for the county of..... without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

COMMISSIONERS ALLOTING A YEAR'S PROVISIONS.

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

COMMISSIONERS DIVIDING AND ALLOTING REAL ESTATE.

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

COMMISSIONER OF WRECKS.

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of....., in the county of....., according to law; so help me, God.

CONSTABLE.

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of constable; I will see and cause the peace of the state to be well and truly preserved and kept, according to my power; I will arrest all such persons, as in my sight, shall ride or go armed offensively, or shall commit or make any riot, affray or other breach of the peace; I will do my best endeavor, upon complaint to me made, to apprehend all felons and rioters or persons riotously assembled, and if any such offenders shall make resistance with force, I will make hue and cry, and will pursue them according to law, and will faithfully and without delay execute and return all lawful precepts to me directed; I will well and truly, according to my knowledge, power and ability, do and execute all other things belonging to the office of constable, so long as I shall continue in office; so help me, God.

COTTON WEIGHER FOR PUBLIC.

I,, public weigher for the city of (or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

EXECUTOR.

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

FINANCE COMMITTEE.

I, A. B., do solemnly swear (or affirm) that I will diligently inquire into all matters relating to the receipts and disbursements of county funds and a true report make, without partiality; so help me, God.

GRAND JURY—FOREMAN OF.

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the state's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unpresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

GRAND JURORS.

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

GRAND JURY—OFFICER OF.

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

JURY—OFFICER OF.

You swear (or affirm) that you will keep every person sworn of this jury, together in some private or convenient place, without meat or drink (water excepted). You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

JURY, IN A CAPITAL CASE.

You swear (or affirm) that you will well and truly try, and true deliverance make, between the state and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence; so help you, God.

JURY, IN CRIMINAL ACTIONS NOT CAPITAL.

You and each of you swear (or affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term.")

JURY, IN CIVIL ACTIONS.

You and each of you swear (or affirm) that you will well and truly try all civil actions which shall come before you during this term, and true verdicts give according to the evidence; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term.")

JURY, LAYING OFF DOWER.

You and each of you swear (or affirm) that you will, without partiality and according to your best judgment, lay off and allot to A. B., widow of C. D., such dower in the lands of said C. D., as by law she is entitled to; so help you, God.

JURY, LAYING OFF ROADS AND ASSESSING DAMAGES.

I, A. B., do solemnly swear (or affirm) that I will lay out the road, directed to be laid out by the board of commissioners of the county, to the greatest ease and advantage of the inhabitants, and with as little prejudice to the owners of land over which the same shall be laid out as may be; and will truly and impartially assess the damages which may be awarded by me for injuries done to lands by the laying out of said road, without favor, affection, malice or hatred, to the best of my skill and knowledge; so help me, God.

JUDGE OF THE SUPREME COURT.

I, A. B., do solemnly swear (or affirm) that in my office of justice of the supreme court of North Carolina I will administer justice without respect to persons, and do equal right to the poor and the rich, to the state and to individuals; and that I will honestly, faithfully and impartially perform all the duties of the said office according to the best of my abilities, and agreeably to the constitution and laws of the state; so help me, God.

JUDGE OF THE SUPERIOR COURT.

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of judge of the superior court of the said state; I will do equal law and right to all persons, rich and poor, without having regard to any person. I will not wittingly or willingly take, by myself or by any other person, any fee, gift, gratuity or reward whatsoever, for any matter or thing by me to be done by virtue of my office, except the fees and salary by law appointed; I will not maintain, by myself or by any other person, privately or openly, any plea or quarrel depending in any of the said courts; I will not delay any person of common right by reason of any letter or command from any person or persons in authority to me directed, or for any other cause whatsoever; and in case any letter or orders come to me contrary to law, I will proceed to enforce the law, such letters or orders notwithstanding; I will not appoint any person to be clerk of any of the said courts but such of the candidates as appear to me sufficiently qualified for that office; and in all such appointments I will nominate without reward, hope of reward, prejudice, favor or partiality or any other sinister motive whatsoever; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

JUSTICE OF THE PEACE.

I, A. B., do solemnly swear (or affirm) that as a justice of the peace of the county of, in all articles in the commission to me directed, I will do equal right to the poor and the rich, to the best of my judgment and according to the laws of the state; I will not, privately or openly, by myself or any other person, be of counsel in any quarrel or suit depending before me; the fines and amercements that shall happen to be made, and the forfeitures that shall be incurred, I will cause to be duly entered without concealment; I will not wittingly or willingly take, by myself or by any other person for me, any fee, gift, gratuity or reward whatsoever for any matter or thing by me to be done by virtue of my office, except such fees as are or may be directed and limited by statute; but well and truly I will perform my office of justice of the peace; I will

not delay any person of common right, by reason of any letter or order from any person in authority to me directed, or for any other cause whatever; and if any letter or order come to me contrary to law I will proceed to enforce the law, such letter or order notwithstanding. I will not direct or cause to be directed to the parties any warrant by me made, but will direct all such warrants to the sheriffs or constables of the county, or the other officers or ministers of the state, or other indifferent persons, to do execution thereof; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, and according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

REGISTER OF DEEDS.

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of, in all things according to law; so help me, God.

SECRETARY OF STATE.

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of secretary of state of the state of North Carolina, during my continuance in office, according to law; so help me, God.

SHERIFF.

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

STANDARD KEEPER.

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steelyards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

STRAY VALUERS.

You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

STATE TREASURER.

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of state treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

TREASURER FOR A COUNTY.

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of, in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

WITNESS TO DEPOSE BEFORE THE GRAND JURY.

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS IN A CAPITAL TRIAL.

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the state and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS IN A CRIMINAL ACTION.

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the state and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS IN CIVIL CASES.

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS TO PROVE A WILL.

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

GENERAL OATH.

Any officer of the state or of any county or township, the form of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of according to the best of my skill and ability, according to law; so help me, God.

Code, ss. 3057, 3315; 1903, c. 604; 1874-5, c. 58, s. 2; R. C., c. 76. s. 6.

2372. County surveyors and deputies may administer oaths, when. The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in laying off widows' dower, in establishing boundaries and in surveying vacant lands under warrants.

Code. s. 3314; 1881, c. 144.

2373. Administered by certain officers. The chairman of the board of county commissioners and the chairman of the board of education of the several counties shall have power to administer oaths, in any matter or hearing before their respective boards.

All sheriffs, constables and registers of deeds shall have power to administer oaths in all matters before them, where the law requires or permits that any person shall in such matters be sworn.

1899, c. 89; 1889, c. 529.

2374. Certain oaths validated. All oaths and affidavits made prior to the first day of March, one thousand eight hundred and ninety-nine, administered by authorized officers to persons with uplifted hands be and the same are hereby validated and made as legal and binding as if administered to persons laying hands on and kissing the Holy Evangelists of Almighty God, whether said oaths and affidavits were made by persons conscientiously scrupulous of taking a "book oath" or not, and whether such oaths and affidavits were made in other respects in strict compliance with section two thousand three hundred and sixty-five: Provided, that this section shall not affect the rights of the parties in actions now pending nor in any manner affect prosecutions for perjury claimed to have been heretofore committed.

1899, c. 50.

CHAPTER 59.

OFFICES.

(Sections 2375—2379.)

2375. No person shall hold more than one office. No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this state, or be eligible to a seat in either house of the general assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes.

Const., Art. XIV, s. 7.

2376. Penalty for holding office contrary to constitution. If any person shall presume to hold any office, or place of trust or profit, or be elected to a seat in either house of the general assembly, contrary to the seventh section of the fourteenth article of the constitution

of the state, he shall forfeit and pay two hundred dollars to any person who will sue for the same.

Code, s. 1870; R. C., c. 77, s. 1; 1790, c. 319; 1792, c. 366; 1793, c. 393; 1796, c. 450; 1811, c. 811.

2377. Bargains made for office void. All bargains, bonds and assurances made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law, shall be void.

Code, s. 1871; R. C., c. 77, s. 2; 5 and 6 Edw. VI., c. 16, s. 3.

2378. Must take oath before acting; penalty for failure. Every officer and other person who may be required to take an oath of office, or an oath for the faithful discharge of any duty imposed on him, and also the oath appointed for such as hold any office of trust or profit in the state, shall take all said oaths before entering on the duties of the office, or the duties imposed on such person, on pain of forfeiting five hundred dollars to the use of the poor of the county in or for which the office is to be used, and of being ejected from his office or place by proper proceedings for that purpose.

Code, s. 1873; R. C., c. 77, s. 4.

2379. Persons holding, deemed doing so lawfully; hold until their successors are qualified. Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office, until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void; and all officers shall continue in their respective offices until their successors shall have been elected or appointed, and shall have been duly qualified.

Code, s. 1872; R. C., c. 77, s. 3; 1844, c. 38, s. 2; 1848, c. 64, s. 1; Const., Art. IV, s. 25.

NOTE. For penalty for acting as officer without giving bond, see s. 245.

CHAPTER 60.

OYSTERS AND FISH.

| | Sections. |
|--------------------------------|-----------|
| I. Terrapin, | 2380—2381 |
| II. Oyster beds, | 2382—2392 |
| III. Catching oysters, | 2393—2413 |
| IV. Oyster industry regulated, | 2414—2433 |
| V. Clams, | 2434 |
| VI. Fishing, | 2435—2485 |

I. TERRAPIN.

2380. Use of drag-nets by nonresidents for catching terrapin forbidden. If any person who is not a citizen and who has not resided in the state continuously for the preceding two years shall use any drag-net or other instrument for catching terrapin he shall be guilty of a misdemeanor.

Code, ss. 3375, 3376.

2381. Diamond-back terrapin protected. If any person shall take or catch any diamond-back terrapin between the fifteenth day of April and the fifteenth day of August of any year, or any diamond-back terrapin at any time, of less size than five inches in length upon the bottom shell, or shall interfere with, or in any manner destroy any eggs of the diamond-back terrapin, he shall be guilty of a misdemeanor, and shall be fined not less than five dollars, nor more than ten dollars, for each and every diamond-back terrapin so taken or caught, and a like sum for each and every egg interfered with or destroyed: Provided this section shall not apply to parties empowered by the state to propagate the said diamond-back terrapin; and the possession of any diamond-back terrapin between the fifteenth days of April and August shall be prima facie evidence that the person having the same has violated this section. It shall be the duty of all sheriffs and constables to give immediate information to some justice of the peace of any violation of this section.

Code, s. 3377; 1899, c. 582; 1881, c. 115, ss. 1, 6.

II. OYSTER BEDS.

2382. Natural, defined. A natural oyster or clam bed, as distinguished from an artificial oyster or clam bed, shall be one not planted by man, and is any shoal, reef or bottom where oysters are to be found growing in sufficient quantities to be valuable to the public.

1893, c. 287, s. 1.

2383. Planted in certain territory. Any inhabitant of this state may make a bed in any of the waters of this state, except that part designated as lying south of Roanoke and Croatan sounds and north of Core sound, and lay down or plant oysters or clams therein, having first obtained license as hereinafter directed from the superior court clerk of the county wherein such bed may be, and he may stake out the grounds so as to include not exceeding ten acres with good and substantial stakes, extending at least two feet above high water-mark, and placed at such intervals as to make the boundaries of such bed or garden distinctly known; and every person who shall obtain such license shall hold the same and have exclusive privilege thereof to him, his heirs and assigns. But no person may have more than one such bed in the same county: Provided, nothing herein shall be construed to affect the rights of any owner or proprietor of lands in which there may be creeks or inlets, or which may be adjacent to any navigable waters, or to authorize any person to appropriate to his own use, or to stake off and enclose any natural oyster or clam bed, or in anywise to infringe the common right of the citizens of the state to any such natural bed or to obstruct the free navigation of the waters aforesaid.

Code, s. 3390; 1883, c. 332, ss. 1, 2.

2384. How license is obtained. Whenever a license is desired according to the preceding section the clerk of the superior court of the county wherein the proposed oyster or clam bed may be may, in his discretion, grant a license to make such oyster or clam bed to any inhabitant of this state who shall apply, therefor as herein provided; such applicant shall first stake off the proposed oyster or clam bed as provided in the preceding section, and shall publish a notice for thirty days at the courthouse door of the county wherein said bed is proposed, designating the location thereof as near as may be and the day when he will apply for the issuing such license. Upon the day named in said notice, upon which application for such license is to be made, any inhabitant of such county shall have the right to appear before said clerk and object to the issuing of such license by filing an affidavit stating that the proposed oyster or clam bed is a natural oyster or clam bed. If the said applicant shall refuse to file an affidavit denying the proposed oyster or clam bed is a natural bed, the said clerk shall refuse to grant such license. If such applicant shall file an affidavit denying that such proposed bed is a natural bed, it shall be the duty of such clerk to transmit said affidavits to the next term of the court of said county, and at said term the issue shall be tried to determine whether the proposed bed is a natural bed, and after such trial the said clerk shall grant or refuse said license in accordance with the judgment rendered upon the determination of such issue.

Code, s. 3391; 1893, c. 287, s. 2.

2385. County commissioners to cause survey to be made. The board of county commissioners may in their discretion cause to be made, not oftener than once in twelve months, a survey and examination of any and every such oyster or clam bed or garden in their county, the result of which examination or survey shall be reported under oath to the clerk of the superior court; and if it be found that the holder of such license as aforesaid has included within his stakes any natural oyster or clam bed, or a space containing more than ten acres, he shall forfeit such license and all the rights and privileges thereto belonging; further, if the holder of such license fail for the space of two years either to use such bed or to keep it properly designated by stakes, he shall forfeit such license and all the rights and privileges therein granted.

Code, s. 3392; 1883, c. 332, s. 4.

2386. Under control of the state. The state shall exercise exclusive jurisdiction and control over all shell-fisheries which are or may be located in the boundaries of the state south of Roanoke and Croatan sounds and north of Core sound, and for the purposes of this chapter the southern boundary line of Hyde county shall extend from the middle of Ocracoke inlet to the Royal Shoal lighthouse, thence across Pamlico sound and with the middle line of the Pamlico and Pungo rivers to the dividing line between the counties of Hyde and Beaufort, and the northern boundary line of Carteret county shall extend from the middle of Ocracoke inlet to the Royal Shoal lighthouse, thence to the Brant Island Shoal lighthouse, thence across Pamlico sound to a point midway between Maw point and Point of Marsh, and thence with the middle line of the Neuse river to the dividing line between the counties of Carteret, Craven or Pamlico, and that portion of Pamlico sound and the Neuse and Pamlico rivers not within the boundaries of Dare, Hyde or Carteret counties, and not a part of any other county, shall be in the county of Pamlico, and for the purposes of this chapter and in the execution of the requirements thereof, the shore line as now defined by the United States coast and geodetic survey shall be accepted as correct.

1887, c. 119, ss. 1, 2.

2387. How beds entered. Any person a citizen and bona fide resident of the state desiring to raise, plant or cultivate shell-fish upon any ground in the county, and within the territory described in the preceding section, which has not been designated as public ground by the board of shell-fish commissioners and which is not a natural clam or oyster bed, may make application in writing, in which shall be stated as nearly as may be the area, limits and location of the ground desired, to the entry-taker of the county in which

the said area for which application is made is situated, for a franchise for the purpose of raising or cultivating shell-fish in said grounds, and the said entry-taker having received said application shall proceed as with all other entries as provided in the chapter entitled Grants, except that the warrant to survey and locate the ground or grounds shall be delivered to the engineer appointed by the secretary of state and not to the county surveyor; and the said engineer shall make such surveys in accordance with the provisions of the chapter entitled Grants, except that it shall not be necessary to employ chainbearers nor to administer oaths to assistants, nor to make surveys, according to the priority of the application or warrant. No entry shall be made to cover any natural oyster or clam bed as defined in this chapter, nor of any land lying more than two miles from the main land or from any island.

1887, c. 119, s. 5; 1893, c. 272.

2388. Secretary of state to issue grant; amount granted limited. The secretary of state, on receipt of the auditor's certificate as provided in the chapter on Grants, shall grant to the applicant a written instrument conveying a perpetual franchise for the purpose of raising and cultivating shell-fish in and to the grounds for which application is made; and the said written instrument of conveyance shall be authenticated by the governor, countersigned by the secretary and recorded in his office. The date of the application for the franchise and a description of the ground for which such franchise was granted shall be inserted in each instrument, and no grant shall issue except in accordance with a certificate from the engineer appointed by the secretary of state as to the area, limits and location of the grounds in which the said franchise is to be granted, and every person obtaining such grant or franchise shall, within three months from the receipt of the same, record said written instrument in the office of the register of deeds for the county wherein the said grounds may lie and shall define the boundaries of the said grounds by suitable stakes, buoys, ranges or monuments; but no franchise shall be given in or to any of the public grounds as determined by the commissioners of shell-fisheries, or to any natural oyster or clam bed, and all franchises granted under this section or any previous law shall be and remain in the grantee, his heirs and legal representatives: Provided, that the holder or holders shall make in good faith within five years from the day of obtaining said franchise an actual effort to raise and cultivate shell-fish on said grounds. No grant shall be made to any one person of more than ten acres of any territory, and no person shall hold more than ten acres in any creek unless the same shall be acquired through devise, inheritance or marriage.

1887, c. 119, s. 6; 1893, c. 272.

2389. Price paid for franchise. Not less than seventy-five cents per acre shall be paid to the state treasurer for all franchises granted, and in all other respects as to protests of entry and the right of the secretary of state to sell to any one else at an increased price the chapter on Grants shall apply.

1887, c. 119, s. 7.

2390. Liable to taxation. All grounds taken up or held for the purpose of cultivating shell-fish shall be subject to taxation as real estate, and shall be so considered in the settlement of the estates of deceased or insolvent persons.

1887, c. 119, s. 9.

2391. Books of records of grants kept. The secretary of state shall keep books of record in which shall be recorded a full description of all grounds granted under the provisions of this chapter, and shall keep a map or maps upon which shall be shown the positions and limits of all public and private grounds.

1887, c. 119, s. 14.

2392. Form of grants approved by attorney general. Entry-takers shall make return to the secretary of state of all franchises granted under this chapter, in the same manner as provided in the chapter entitled Grants, and the provisions of that chapter are hereby extended so as to cover the grants or franchises in ground for raising or cultivating shell-fish as authorized by this chapter; and all applications, grants, warrants and assignments of franchises in or to oyster grounds shall be in manner and form as approved by the attorney general of the state.

1887, c. 119, s. 12.

III. CATCHING OYSTERS.

2393. Close season, exception. If any person shall buy or sell oysters in the shell which have been taken from the public grounds or natural oyster beds of this state between the first day of April and the first day of October in any year, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that oysters may be taken with hand-tongs only during the month of April in any year, to be used for planting on private grounds, entered and held under the laws of this state: Provided further, that oysters may be taken with hand-tongs only for home consumption: Provided further, that "coon" oysters may be taken at any time from the waters of Carteret and Onslow counties.

1903, c. 516, s. 22.

2394. At night or on Sunday. If any person shall catch or take any oysters from any of the public grounds or natural oyster beds of the state at night or on Sunday, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 16.

2395. Illegal dredging. If any person shall use any scoops, scrapes or dredges for catching oysters except at the times and in the places in this chapter expressly authorized, or shall between the fifth day of April and the fifteenth day of November of any year carry on any boat or vessel any scoops, scrapes, dredges or winders, such as are usually or can be used for taking oysters, he shall be guilty of a misdemeanor.

1903, c. 516, ss. 13, 14, 15.

2396. Catching oysters without license. If any person shall catch oysters from the public grounds of the state without having first obtained a license according to law, or shall employ any person as agent or assistant, or shall as the agent or assistant of any person catch oysters from the public grounds, without all of said persons having first obtained a license according to law, he shall be guilty of a misdemeanor, and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 6.

2397. Using boats not licensed. If any person shall use any boat or vessel in catching oysters, which boat has not been licensed according to law, and which is not in all respects complying with the law regulating the use of such vessels, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars nor less than ten dollars or imprisoned not more than thirty nor less than ten days for the first offense, but for the second or subsequent offense he shall be guilty of a misdemeanor and punished at the discretion of the court.

1903, c. 516, s. 8.

2398. Displaying false number on boat. If any person shall display any other number on their sail than the one specified in their license or display a number when the boat or vessel has not been licensed, he shall be guilty of a misdemeanor and shall be fined not less than twenty-five dollars.

1903, c. 516, s. 27.

2399. Failure to stop and show oyster license. If any person using a boat or vessel for the purpose of catching oysters shall refuse to stop and exhibit his license when commanded to do so by the oys-

ter commissioner, assistant commissioner or any inspector, he shall be guilty of a misdemeanor and be fined not less than twenty-five dollars nor more than fifty dollars.

1903, c. 516, s. 26.

2400. False statement in application for oysterman's license.

If any person shall make any false statement for the purpose of procuring any license, which may be required by law, to catch oysters, or to engage in the oyster industry, he shall be guilty of perjury and punished as provided by law.

1903, c. 516, s. 17.

2401. Dredging in prohibited waters. If any person, after the governor has by proclamation suspended the right to use scoops, serapes or dredges on the public grounds or natural oyster beds of the state, shall during the time of such suspension, and in the waters as to which the right has been suspended, use such instruments or implements to catch oysters from any of the public grounds or natural oyster beds of the state, he shall be guilty of a misdemeanor and be fined not less than five hundred dollars or imprisoned not less than twelve months, and the boat or vessel used for this purpose shall be forfeited and shall be seized, advertised and sold by the oyster commissioner or by the inspectors in the county wherein said illegal act was committed and the proceeds paid into the oyster fund. In any prosecution for the violation of the provisions of this section against the master or owner of a boat or vessel, proof that said boat or vessel was equipped with scoop, serape or dredge or other implement or instrument for catching or taking oysters other than ordinary oyster tongs shall be prima facie evidence of the defendant's guilt.

1903, c. 516, s. 19.

2402. Selling oysters not culled. If any person shall sell or offer for sale, transport or offer to transport out of the state, or from one point in the state to another, or have in his possession any oysters, which have not been properly culled according to law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 3.

2403. Oysters where purchased to be carried out of the state.

If any person shall purchase and load on any vessel or boat any oysters to be carried out of the state in the shell, except at the following places, to-wit: The south end of Roanoke Island, Stumpy Point Bay, Pareded Corn Bay, Wysoeking Bay, West Bluff Bay, Great Island Narrows or Swan Quarter Bay (as the oyster commissioner may determine), Portsmouth, Ocracoke, Bay River, mouth of Rose Bay

or Harbor Island; or if any person shall load more than one boat or vessel at any of said places at one and the same time, or if any person shall load any boat or vessel with oysters to be carried out of the state without such vessel having an inspector on board at the time the oysters are delivered, or shall carry any vessel loaded or partly loaded with oysters through the canals without a certificate showing that the oysters have been inspected and the taxes thereon paid, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days.

1903, c. 516, s. 17.

2404. Unloading oysters on Sunday or at night. If any person shall unload any oysters from any boat, vessel or car at any factory or house for shipping, shucking or canning oysters on Sunday, or after sunset or before sunrise, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, whenever any boat or vessel shall have partially unloaded or discharged its cargo before sunset, the remainder of said load or cargo may be discharged in the presence of an inspector.

1903, c. 516, s. 16.

2405. Dealing in oysters without license. If any person shall engage in the business of buying, canning, packing, shipping or shucking oysters without having first obtained a license as required by law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 9.

2406. Dealer failing to keep record. If any person engaged in buying, packing, canning, shucking or shipping oysters shall fail to keep a permanent record of all oysters bought by him or caught by him, or by persons for him, when and from whom bought, the number of bushels and the price paid therefor, or shall fail upon demand to exhibit such record as required by law, or shall fail to verify the same, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 5.

2407. Oyster shells not carried out of state; vessel seized, when. If any person shall carry any oyster shells out of this state in any boat or vessel or other mode of transportation, he shall be guilty of a misdemeanor and be fined five hundred dollars, or imprisoned not exceeding twelve months. All boats or vessels or other vehicles of transportation found loaded with oyster shells for transportation out of the state shall be seized and the cargo sold for the benefit

of the oyster fund. Such sale shall be made after due advertisement for twenty days at three public places, such advertisement and sale to be made by the oyster commissioner or any oyster inspector. Nothing in this section shall be construed to prohibit the transportation of live oysters which have been properly inspected and upon which the taxes required by this chapter have been paid in full, from the state. All oysters taken from the public grounds or natural oyster beds of this state shall be subject to the provisions of this section whether in the hands of the parties taking or catching the same or in the hands of any subsequent purchaser of the same.

1903, c. 516, s. 23.

2408. Evidence of illegal dredging. If any boat or vessel shall be seen sailing on any of the waters of this state during the season when the dredging of oysters is prohibited by law in the same manner in which they sail to take or catch oysters with scoops, scrapes or dredges, the said boat or vessel shall be pursued by any officer authorized to make arrests, and if said boat or vessel apprehended by said officer shall be found to have on board any wet oysters or the scoops, scrapes, dredges or lines, or deck wet, indicating the taking or catching of oysters at said time, and properly equipped for catching or taking oysters with scoops, scrapes or dredges, such facts shall be prima facie evidence that said boat or vessel has been used in violation of the provisions of the law prohibiting the taking or catching of oysters with scoops, scrapes or dredges in prohibited territory, or at a season when the taking or catching of oysters with scoops, scrapes or dredges is prohibited by law, as the case may be.

1903, c. 516, s. 28.

2409. Arrests without warrant, when and how made. The oyster commissioner, assistant oyster commissioner and inspector shall have power with or without warrant to arrest any person violating any of the oyster laws.

1903, c. 516, s. 2.

2410. Using illegal measure for oysters. If any person shall in buying or selling oysters use any measure other than that prescribed by law for the measurement of oysters, or if any dealer in oysters shall have in his possession any measure for measuring oysters other than that prescribed by law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1903, c. 516, s. 12.

2411. Catching oysters for lime. If any person shall take or catch any live oysters to be burned for lime or for any agricultural

or mechanical purpose, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Code, s. 3389; 1885, c. 182.

2412. Larceny of oysters on private beds. Any person who shall feloniously take, catch or capture or carry away any shell-fish from the bed or ground of another shall be guilty of larceny and punished accordingly.

1887, c. 119, s. 15.

2413. Oysters caught at night; injury to private beds. If any person shall wilfully commit any trespass or injury with any instrument or implement upon any ground upon which shell-fish are being raised or cultivated, or shall remove, destroy or deface any mark or monument lawfully set up for the purpose of marking any grounds, or who shall work on any oyster ground at night, he shall be guilty of a misdemeanor. But nothing in the provisions of this section shall be construed as authorizing interference with the capture of migratory fishes or free navigation or the right to use on any private ground any method or implement for the taking, growing or cultivation of shell-fish.

1887, c. 119, s. 11.

IV. OYSTER INDUSTRY REGULATED.

2414. Commissioner and assistant, how appointed, removed; term; salary; bond; oath of office. For the purpose of enforcing the oyster law, the governor shall appoint an "oyster commissioner" and an assistant "oyster commissioner," whose term of office shall be two years, or until their successors are appointed and qualified. They may be removed by the governor at any time for cause. The commissioner shall give bond in the sum of two thousand dollars; the assistant commissioner shall give bond in the sum of one thousand dollars. The bonds shall be payable to the state of North Carolina, shall be conditioned for the faithful discharge of their office, and the proper accounting for all moneys received, shall have at least two sufficient sureties, and shall be approved by and filed with the clerk of the superior court of the county in which the officer resides and be a part of the records of his office. They shall take and subscribe oaths to support the constitution and for the faithful performance of the duties of their office, which oaths shall be filed with the bond. The salary of the commissioner shall be nine hundred dollars per annum, and he shall be allowed three hundred dollars for expenses. The salary of the

assistant commissioner shall be seven hundred and fifty dollars per annum. The salaries shall be payable monthly.

1903, c. 516.

2415. Inspectors, how appointed; term; salary; bond; oath of office. The oyster commissioner shall appoint, from the counties within which they are to perform their duties, a sufficient number of inspectors who shall serve during the oyster season, and may remove them for cause. He shall fix the compensation of the inspectors at not exceeding fifty dollars a month while on duty, and shall designate the length of service, the time when the inspectors go on duty, and when they go off. The inspectors shall give bond in the sum of five hundred dollars, payable to the state of North Carolina, conditioned for the performance of the duties of their office, and the faithful accounting for all moneys received, which bond shall have at least two sufficient sureties, to be justified before approved by and filed with the clerk of the superior court of the county where they reside, and shall take, subscribe and file with such clerk an oath of office. They shall be paid only for the time they serve.

1903, c. 516.

2416. Duties of the oyster commissioner. The oyster commissioner shall have a general supervision over every branch of the oyster industry, and see that the laws regulating the same are rigidly enforced. He shall furnish the inspectors and the clerks of the superior courts of the several counties mentioned in this subchapter such receipt and record books, and other kinds of stationery as may be necessary to keep a correct record and account of all the money collected and all information necessary to be kept. Such stationery shall be furnished by the commissioner of labor and printing upon requisition of the oyster commissioner. He shall see that the law regulating the catching and handling of oysters is enforced; that no illegal methods are used in catching, selling or shipping; that the cull law is rigidly enforced, and that only proper and legal measures are used in buying and selling. He shall prosecute all violations of the law, and whenever it is necessary he may employ counsel for this purpose. He may also employ or charter sail vessels, tugs and other boats when necessary to the performance of the duties of his office. He shall in his official capacity have power to administer oaths and to send for and examine persons and papers. He shall, on or before the twenty-fifth day of each month, mail to the treasurer of the state a consolidated statement showing the amount of taxes collected during the preceding month and by and from whom collected. He shall make a biennial report to the governor, setting forth in detail an account of his official acts, the condition of the oyster industry in all its branches, and shall recommend such addi-

tions to or modifications of existing laws relating thereto as he may deem proper and necessary. He shall have power and authority and it shall be his duty to make and prescribe all such reasonable rules and regulations as may be necessary and to carry into effect and operation the laws relative to the oyster industry according to its true intent and purposes.

1903, c. 516, ss. 3, 18.

2417. Duties of the assistant commissioner. The assistant oyster commissioner shall be charged with the special supervision, under the commissioner, of all matters relating to oyster industry in the different counties. He is particularly charged with the rigid enforcement of the cull feature of the law, the provisions against the use of illegal measures in buying or selling and the unlawful use of scoops, scrapes and dredges in the bays, creeks, straits, sounds, rivers and their tributaries and elsewhere where the same is prohibited.

1903, c. 516, s. 3.

2418. Duties of inspectors. The inspectors shall, under the commissioner and assistant commissioner, be charged with all matters relating to the oyster industry in their respective counties; they shall inspect all oysters offered for sale in their county, see that they are properly culled, see that none of the provisions of the law regulating the oyster industry are violated, collect all taxes from dealers on oysters purchased or caught; keep a correct record of all taxes collected by them and from whom and for what purpose collected; and on or before the fifth day of each month mail to the oyster commissioner a report, on such form as he may prescribe, showing all taxes collected by them and from whom received, and at the same time pay over to the commissioner the amount of such taxes.

1903, c. 516, s. 3.

2419. Who may be licensed to catch oysters. No person shall be licensed to catch oysters from the public grounds of the state who is not a bona fide resident of this state and who has not continuously resided therein for two years next preceding the date of his application for license.

1903, c. 516, s. 6.

2420. How license obtained to catch oysters; who may issue; form of. Any person desiring to catch oysters from the public grounds and natural oyster beds shall make and subscribe to the following oath, before some officer qualified to administer oaths:

I, being an applicant for oyster license, do solemnly swear that I am a citizen of North Carolina and have been a resident of the state for the two years next preceding this day; that my place of residence is now in county; that I will not, if granted license, employ any nonresident or unlicensed

person as an assistant or serve as an assistant to any nonresident or unlicensed person, nor will I transfer, assign or otherwise dispose of my license to any person, firm or corporation; that I will not knowingly or wilfully violate or evade any of the laws or regulations of the state relating to oyster industry; so help me, God.

He shall then present to and file said oath with the clerk of the superior court of Hyde, Dare, Beaufort, Carteret, Pamlico or Craven county, and the said clerk, if satisfied with the truth of the statement made in the oath of application, shall issue to him an oysterman's license in the following form:

State of North Carolina, County.

....., a resident of.....county, having this day made application to me for an oysterman's license, and having filed with me the oath prescribed by law, I do hereby grant to him license to catch oysters from the public grounds of this state from the fifteenth day of October,, until the first day of next April. Witness my hand and official seal, this the.....day of19....

Clerk of the Superior Court.....County, North Carolina.

The said oath and a record of the license shall be kept by the clerk, and for issuing and recording the same he shall receive from the applicant a fee of twenty-five cents. No fee shall be charged by the clerk for administering the oath.

1903, c. 516, s. 7.

Note. For making false affidavit, see Crimes.

2421. License for boat used in catching oysters. The clerk of the superior court of Beaufort, Carteret, Craven, Dare, Hyde or Pamlico county may grant license for a boat to be used in catching oysters, upon application made, according to law, and the payment of a license tax as follows: On any boat or vessel without cabin or deck, and under customhouse tonnage, using scoops, scrapes or dredges, measuring, over all, twenty-five feet and under thirty, a tax of three dollars; fifteen feet and under twenty feet a tax of two dollars; on any boat or vessel with cabin or deck and under customhouse tonnage, using scrapes or dredges, measuring over all, thirty feet or under, a tax of five dollars; over thirty feet a tax of six dollars; on any boat or vessel, using scoops, scrapes or dredges, required to be registered or enrolled in the customhouse, a tax of one dollar and fifty cents a ton on gross tonnage. No vessel propelled by steam, gas or electricity, and no boat or vessel not the property absolutely of a citizen or citizens of this state on the first day of January, one thousand nine hundred and three, or unless built or owned in this state subsequent thereto and actually owned by a bona fide resident of this state under this chapter, shall receive license or be permitted in any manner to engage in the catching of oysters anywhere in the waters of this state. All boats or

vessels so licensed to scoop, scrape or dredge oysters shall display on the port side of the jib, above the reef and bonnet and on the opposite side of mainsail, above all reef points, in black letters, not less than twenty inches long, the initial letter of the county granting the license and the number of said license, the number to be painted on canvass and furnished by the clerk of the superior court issuing the license, for which he shall receive the sum of fifty cents. Any boat or vessel used in catching oysters without having complied with the provisions of this section may be seized, forfeited, advertised for twenty days at three public places in the county where seized, and sold at some public place designated in the advertisement, and the proceeds paid into the oyster fund.

1903, c. 516, s. 8.

2422. License to oyster dealers. The clerk of the superior court of Beaufort, Carteret, Craven, Dare, Hyde or Pamlico county shall, upon application and the payment of a fee of fifty cents, grant to the applicant a dealer's license, authorizing the applicant to engage in the business of buying, purchasing, canning, packing, shucking or shipping oysters. Such license shall not be issued prior to the fifteenth day of October of any year and shall expire on the first day of April following. The clerk granting the license shall at once mail a duplicate to the oyster commissioner.

1903, c. 516, s. 9.

2423. Clerks superior courts to report licenses monthly. The clerks of the superior courts of the several counties who are authorized to issue license or to collect a license tax shall, on or before the fifteenth day of each month, mail to the oyster commissioner a statement, showing all licenses issued during the preceding month, to whom issued and for what purpose, and the amount of tax collected by them from all sources under the oyster laws, and shall at the same time remit said amount, less two and one-half per cent. as their commission, direct to the state treasurer. They shall at the same time mail to each inspector asking for the same a list of all persons to whom license has been issued and of all boats or vessels licensed, and for what purpose.

1903, c. 516, s. 4.

2424. Dredging, when allowed; prohibited territory. Any bona fide resident of the state duly licensed according to law and using a licensed boat or vessel may use scoops, scrapes or dredges in catching or taking oysters from the fifteenth day of November in each year to the first day of April following, from the public grounds and natural oyster beds in the broad open waters of Pamlico sound, Pamlico river, Neuse river and Long Shoal river, except in those

portions of said sound and rivers in which the use of such instruments and implements is prohibited as herein provided. No person shall use any implement or instrument except hand-tongs in catching oysters in any bay, river, creek, strait, or any tributary of such which border upon or empty into Pamlico sound, Pamlico river, or Long Shoal river, except as hereinafter provided; and any point inside of a line drawn from the farthest or extreme outward point of land or marsh on the one side to the farthest or extreme outward point of land or marsh on the opposite side of any creek, strait or bay, shall be construed to be within the said creek, strait or bay, for the purposes of this section. Nor shall any person use any implement or instrument except hand-tongs in the waters of Pamlico sound from what is known as the Reef or Reefs in the eastern portion of said sound to the line of banks bordering its eastern shores; nor along the shores of Pamlico county inside of a line beginning at Maw Point and running to the west end of Brant island, thence to Pamlico Point; nor in the waters of Pamlico sound north of a line running from Long Shoal light to Gull Shoal life-saving station, from the first day of February of each year to the fifteenth day of November, nor in any of the waters of Carteret county. And for the purpose of this section, the northern boundary of said county shall be a line extending from Swan Point to Harbor Island light, thence a line to Southwest Straddle light, thence a line to Northwest Point light, thence a line to the middle of Ocracoke Inlet.

1903, c. 516, ss. 13, 14, 15.

2425. Governor may suspend right to dredge. The governor, upon the request of the oyster commissioner, may, whenever in his judgment it is necessary, by proclamation, suspend entirely the use of all scoops, scrapes or dredges in any of the waters of the state, either for a definite period of time or until the sitting of the next general assembly.

1903, c. 516, s. 19.

2426. Oysters culled on grounds. All oysters taken from the public grounds of this state, with whatsoever instrument or implement, shall be culled and all oysters whose shells measure less than two and one-half inches from hinge to mouth, except such as are attached to a large oyster and can not be removed without destroying the small oyster, and all shells taken with the said oysters shall be returned to the public ground when and where taken, and no oysters shall be allowed by the inspectors to be marketed which shall consist of more than ten per cent. of such small oysters and shells except "coon" oysters and oysters largely covered with mussels: Provided, these musselled oysters must not contain more than ten per cent. of shells or small oysters under regulation size.

1903, c. 516, s. 11.

2427. Oysters not culled seized and put on public grounds.

Whenever oysters are offered for sale or loaded upon any vessel, car or train, without having been properly culled according to law, the commissioner, assistant commissioner, or inspector shall seize the boat, vessel, car or train containing the same and shall cause the said oysters to be scattered upon the public grounds, and the costs and expenses of said seizure and transportation shall be a prior lien to all liens on said boat, vessel, car or train, and if not paid on demand the officers making the seizure shall, after advertisement for twenty days, sell the same and make title to the purchaser, and after paying expenses as aforesaid pay the balance, if any, into the oyster fund.

1903, c. 516, s. 3.

Note. For selling uncultured oysters, see s. 2402.

2428. Dimensions of oyster measure. All oysters measured in the shell shall be measured in a circular tub with straight sides and straight, solid bottom, with holes in the bottom not more than one-half inch in diameter. The said measure shall have the following dimensions: A bushel tub shall measure eighteen inches from inside to inside across the top, sixteen inches from inside to inside across the bottom and twenty-one inches diagonal from inside chime to top. All measures used for buying or selling oysters shall have a brand, to be adopted by the oyster commissioner, stamped therein by said commissioner, assistant commissioner, or his lawful inspectors. All measures found in the possession of any dealer not meeting the requirements of this section shall be destroyed by said oyster commissioner, assistant commissioner or inspector.

1903, c. 516, s. 12.

2429. Dealers to keep records. All persons engaged in buying, packing, canning, shucking or shipping oysters shall keep a permanent record of all oysters either bought or caught by them, or by persons for them, when and from whom bought, the number of bushels and the price paid therefor. All these records shall at all times be open to the examination and inspection of the oyster commissioner, assistant oyster commissioner and inspector, and upon request shall be verified by the parties making them.

1903, c. 516, s. 5.

2430. Purchase tax. All dealers in oysters and all persons who purchase oysters for canning, packing, shucking or shipping shall pay a tax of one and one-half cents on every bushel of oysters purchased by them, or caught by them, or any one for them: Provided, that "coon" oysters shall be taxed one-half a cent a bushel only; and no oysters shall be twice taxed. This tax shall be paid to and col-

lected by the inspectors, and when paid a receipt shall be given therefor. Upon failure or refusal by any person, firm or corporation to pay said tax, his license as a dealer shall at once become null and void, and no further license shall be granted him during the current year, and it shall be the duty of the commissioner, assistant commissioner or inspector to institute suit for the collection of said tax. Such suit shall be in the name of the state of North Carolina on relation of the commissioner or of the inspector at whose instance such suit is instituted, and the recovery shall be for the benefit and to the use of the general oyster fund.

1903, c. 516, s. 10.

2431. Vessels with oysters, when allowed to go through canals.

No boat or vessel loaded with oysters shall be permitted by the inspectors at South Mills and Coinjock to pass through the canals, which do not have a certificate showing that the cargo has been inspected and the tax paid thereon.

1903, c. 516, s. 17.

2432. Shells scattered on oyster beds. The oyster commissioner is hereby empowered to expend one-half of the balance to the credit of the oyster fund on the fifteenth day of April in each year for the purpose of buying oyster shells and scattering the same on the natural oyster grounds of the state during the months of April and May.

1903, c. 516, s. 20.

2433. Oyster funds kept separate, how paid out. The treasurer of the state shall keep all funds derived from the oyster industry separate and apart from other funds in the treasury and shall pay the same out only upon the warrant of the auditor, and the auditor shall issue no warrant on said fund in payment of any claim unless the same shall have been first approved by the oyster commissioner.

1903, c. 516, s. 20.

V. CLAMS.

2434. Clams. If any person between the first day of April and the first day of November of any year shall take any clams from the waters of Brunswick, New Hanover or Pender counties for the purpose of shipping, selling, marketing, or for bedding or pounding the same in any artificial bed, or if any person shall take or catch any oysters in the waters of Carteret county by dredging or scoops, or in any manner other than with the ordinary clam rake, or tongs, or if any nonresident shall take or catch any clams, he shall be guilty of a misdemeanor.

1901, c. 113; 1897, c. 333; 1899, c. 579; 1903, cc. 131, 414, 658, 732.

VI. FISHING.

2435. Croatan marshes. If any person, for the purpose of taking fish, shall between the first day of February and the first day of May, of the same year, use or cause to be used, at or within half a mile of the marshes separating the waters of Croatan and Pamlico sounds, any weir, hedge, net or seine, he shall be guilty of a misdemeanor.

Code, s. 3378; R. C., c. 81, s. 4; 1844, c. 40, s. 3.

2436. Masonboro and Myrtle Grove sound. If any person shall use any fyke nets or set down seines, or place any fish trap for the purpose of catching fish in the waters of Masonboro and Myrtle Grove sounds in New Hanover county, he shall be guilty of a misdemeanor, and fined not more than fifty dollars, or imprisoned not more than twenty days.

Code, s. 3421; 1883, c. 288, ss. 1, 2.

2437. Catching oysters in Myrtle Grove sound. If any person shall take or catch any oysters from Myrtle Grove sound, from Perrines or Whitaker's creek to the head waters of said sound in New Hanover county, from the first day of May until the first day of September, except for his own consumption, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than twenty days.

Code, s. 3423; 1883, c. 358, ss. 1, 2.

2438. Lay days for Pamlico river. If any person, from the fifteenth day of February to the tenth day of May of every year, from twelve o'clock meridian of Saturday until sunrise Monday morning of each week, shall fish any seine, set net, drift net, or any other net of any name or kind whatever, in the waters of Pamlico or Tar rivers and tributaries, except bow or skim nets, he shall be guilty of a misdemeanor.

Code, s. 3416; 1883, c. 137, s. 3.

2439. Fishing dutch nets in Pamlico and Tar rivers. If any person shall set down or fish any dutch, pod, pyke or pound net or net of like kind in the waters of Pamlico or Tar rivers or their tributaries except in the manner, and in the part, and during the time, which such nets are by law allowed to be fished, he shall be guilty of a misdemeanor, and shall be fined not less than fifty dollars nor more than one hundred dollars, and shall be imprisoned in the county jail not less than thirty and not more than sixty days.

Code, s. 3417; 1903, c. 52.

2440. Dutch nets in Pamlico river. It shall be lawful to fish with dutch, pod, pyke or other pound nets, or nets of like kind, in the waters of Pamlico river below a line beginning on the southern shore of Pamlico river at Maule's Point, and running due north to a point on the northern shore of said river: Provided, that no dutch, pod, pyke or pound net, or other net of like kind, shall extend out in said river more than one-eighth of the distance across said river from the shore, and that none of said dutch, pod, pyke or pound nets shall be set, placed down or fished nearer to each other than five hundred yards, measuring up and down the river; nor shall they be placed, set down or fished within five hundred yards of any seine beach in actual use for hauling a seine, nor within one mile of the mouth of Bath creek: Provided, no nets of the kind enumerated in this section, or other nets of like kind, shall be placed down, set or fished in said rivers between the tenth day of May and the first day of July in any year. Whenever any person shall complain to the oyster commissioner or any inspector that dutch, pod or pyke nets, or other nets of the like kind, have been placed down or set in any of the waters of Pamlico river, or any of its tributaries, contrary to and in violation of this section, said oyster commissioner or inspector, or person performing the duties of such, shall at once visit said river, make a complete and full examination of all dutch, pod or pyke nets, or other nets of like kinds in said river, and ascertain whether they are placed down, set or fished in violation of the provisions of this section, and he shall report to the solicitor of the district in which the offense is committed.

Code, s. 3417: 1903, c. 52.

2441. Direction of nets in Pamlico sound. Every net (unless the same be a drag-net and hauled to the shore), which may be used for catching shad in that portion of the waters of Pamlico sound, lying between a line drawn eastwardly from Stumpy Point and Mount Pleasant in Hyde county to a point ten miles south of Hatteras inlet in said sound, shall be set and fixed in said waters, in a direction from north to south, and shall not be used in any other manner: and any person offending against this section, shall, for every offense, forfeit five dollars.

Code, s. 3381: 1889, c. 261; R. C. c. 81, s. 7; 1844, c. 40, s. 6.

2442. In Carteret county. If any person shall catch mullets in the waters of Carteret county with a seine or net having a mesh of less than one and one-eighth inch, or if any person shall in the waters of Carteret county, except in Neuse river, use for the purpose of catching fish, except menhaden or fatbacks, any seine or net more than two hundred and twenty-five yards long; or shall join two or more nets together in said county so that the length thereof shall

be more than two hundred and twenty-five yards, he shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days. And any person using a net exceeding the length allowed by this section, shall forfeit said net, one-half thereof to go to the informer, the other half to the school fund.

1895, c. 25; 1903, c. 508.

2443. Dutch nets in Carteret county. If any person shall use or cause to be used any dutch net, pond net or other stationary trap, net or seine of similar description by whatever name known, in the waters of Carteret county for the purpose of taking fish therefrom, shall for each day's use thereof forfeit and pay the sum of fifty dollars. The penalties herein created shall be recovered by a warrant before any justice of the peace in the county of Carteret, and shall be applied to the use of the public schools of said county; and such offender in addition to the penalties contained in this section shall be guilty of a misdemeanor, and fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than six months nor more than twelve months: Provided, this section shall not apply to the ordinary set nets heretofore in use in the waters of said county.

Code, s. 3420; 1883, c. 199.

2444. Obstructions in Carteret county. If any person shall obstruct any navigable water or passageway for fish in Carteret county by placing bushes, posts or any stationary material or fixtures in such a manner as to prevent the free passage of fish, he shall be guilty of a misdemeanor and fined not less than one hundred dollars. Nothing in this section shall be construed to prohibit any person from using a lawful net or seine in any way or manner except as a stop net or seine. This section shall not apply to any net that the fish can pass freely by one end.

1903, c. 520.

2445. Mulletts and menhaden in Carteret. If any person shall fish for or catch any mullets with any purse seine or purse net in any waters within the limits of Carteret county, extending to the extreme limits of the state's jurisdiction in and over such waters, or shall catch any menhaden or fatbacks within the waters of said county, in any purse net or purse seine with a bar of less than one inch and with a mesh of less than two inches, or shall knowingly manufacture into fish scrap any menhaden or fatbacks caught in any net or seine having bars of less than one inch or having meshes of less than two inches, he shall be guilty of a misdemeanor and be fined not less than five hundred dollars or imprisoned not less than one year. For the purposes of this section the following boundaries be

and the same are hereby declared to be the boundaries to which the waters of said county extend, to-wit: A distance of three nautical miles measured from the outer beach or shores of Carteret county out and into the waters of the Atlantic ocean; and any portions of any water within a distance of three miles from said waters of the Atlantic ocean to any beach or shore of said county shall be deemed the waters of said county for the purposes of this section.

1903, c. 583.

2446. Dutch nets in Albemarle sound and its tributaries. No person shall set or fish any dutch net or pod net in Roanoke river, Cashie or Middle and Eastmost rivers, or within two miles of the mouth of said rivers, or within one mile of the mouth of any other river emptying into Albemarle sound, of less than two miles in width at its mouth, and any such net set within one mile of the mouth of any other river emptying into said sound shall not extend into the main channel at its mouth. No person shall set or fish with a dutch net or pod net within half a mile to the eastward or westward of the outside windlasses or snatch-blocks of any seine fishery in operation on said sound; and any such net set or fished within one mile of such windlasses or snatch-blocks of any seine fishery in operation shall run in a due north and south course from the shore, and shall not extend further into the sound from the water's edge than the distance from such windlasses or snatch-blocks to the line of such net; and all persons who shall set or fish any such net in said sound shall pull up and remove the stakes used for the same by the first day of June next succeeding the fishing season, and if any person shall set or fish any dutch net or pod net in said sound in violation of this section he shall be guilty of a misdemeanor, and be subject to a penalty of three hundred dollars, to be recovered by any person in the superior court of the county in which the offense shall be committed. And the sheriff of such county shall, when requested, remove any portion of such nets set or fished in violation of this section at the cost of the violator: Provided, that dutch nets may be used in Cashie river two and one-half miles from its mouth, if they do not extend more than one-third the width of said river from the shore, and such nets may be along the sound shore on the Bertie county side between the following points along said shore, to-wit: commencing at the mouth of Cherry Tree Cut branch, Kentrock field and Landing field, and running around the shore to the mouth of Morgan swamp, thence to Rock Spring branch, and that any nets set or fished within that line shall not extend from the shore in any direction a greater distance than four hundred and fifty yards measured at high water, and within this distance of four hundred and fifty yards is to be included the nets, hedges and all parts thereof.

Code, s. 3383; 1889, c. 122; 1891, c. 322; 1895, c. 245; 1899, c. 310; 1899, c. 412.

2447. Perquimans river. If any person shall fish with any seine, or set any dutch net or hedge within one mile of a straight line commencing at Stephenson's point on the north side of Perquimans river and running in a southwesterly direction to the nearest point of land on the south side of said river known as Belgrade bluff, or shall haul any seine or set any dutch net or other kind of net so as to extend beyond the middle of said river at any part thereof, he shall be guilty of a misdemeanor.

1893, c. 147, ss. 1, 2, 4.

2448. Pasquotank county. If any person shall set any fyke or pound net in Pasquotank river above the town of Elizabeth City, or shall haul or fish with a drag-net, or set a pound net in Big Hatley creek, or Little Hatley creek within two hundred yards of the mouth of either of said creeks, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1895, c. 389; 1903, c. 497.

2449. Obstructions in Little river. If any person shall place any obstruction in Little river, dividing the counties of Pasquotank and Perquimans, and allow it to remain for a longer time than ten days, he shall be guilty of a misdemeanor, and fined not less than five dollars, nor more than ten dollars: Provided, nothing in this section shall be so construed as to prohibit citizens from fishing with dip-nets in said river during the months of March and April in each year.

Code, s. 3400; 1881, c. 18.

2450. Fish offal not thrown in navigable waters. If any person shall throw, or cause to be thrown, into the channel of any of the navigable waters of the state, any fish offal, in any quantity that shall be likely to hinder or prevent the passage of fish along such channel, or if any person shall throw or cause to be thrown into the waters known as the "Frying Pan," tributary to the Great Alligator river, in Tyrrell county, any fish offal in any quantities whatsoever, he shall be guilty of a misdemeanor.

Code, ss. 3386, 3389, 3407.

2451. Scuppernong river. If any person shall set any kind of a fish weir or pod net, gill net or net of any kind in the Scuppernong river using more than one-half of the channel of said river, or within one hundred yards of the public bridges at Columbia and the Cross landing, crossing said river, he shall be guilty of a misdemeanor, and fined a sum not to exceed fifty dollars, or imprisoned not to

exceed thirty days: Provided, this section shall not apply to the hauling of seines.

Code, s. 3408; 1885, c. 18; 1903, c. 91.

2452. Drift nets in the sounds. If any person shall drift or fish any drift nets between the first day of February and the first day of May of any year, within two miles of the mouth of any river emptying into Albemarle sound, or within three miles of any seine-beach on the Albemarle or Croatan sounds while being fished, or within ten miles of Ocracoke, Hatteras, Oregon or New inlets, or within ten miles of the Roanoke marshes, he shall be guilty of a misdemeanor, and be fined not less than fifty dollars or imprisoned not less than thirty days: Provided, the people of Dare county shall be allowed to use drift nets for herring.

Code, s. 3396; 1881, c. 274, ss. 1. 2; 1883, c. 145.

2453. Frying Pan creek, Tyrrell county. If any person shall fish any pound net, gill net, seine or nets of any kind in Alligator river within one mile of the mouth of Frying Pan creek in Tyrrell county, or shall set any weir or fish net of any kind or any other obstruction that prevents the passage of fish in said creek from its mouth to Jarmin's Point, at the two pines and low cypress, he shall be guilty of a misdemeanor.

1889, c. 105; 1899, c. 465.

2454. Net stakes removed from certain waters. Every person who shall set or use any net in the waters of Pamlico, Croatan, Currituck or Albemarle sounds or their tributaries, except Perquimans river, shall be required to pull up and remove their net stakes within thirty days from the day the nets were taken from them, and not later than the first day of June, and any person failing to pull up and remove their stakes, as required by this section, shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days:

Code, ss. 3382, 3414; 1883, c. 69; R. C., c. 81, s. 8; 1844, c. 40, s. 7; 1852, c. 13; 1893, c. 147.

2455. Dutch nets at the inlets. If any person shall set any pound net, dutch net or hedge net within two miles of Oregon inlet or Hatteras inlet or within ten miles of New inlet in Dare county, North Carolina, or shall between the first day of January and the first day of May following of any year, set or operate any seine or stationary nets of any kind in the main channels within three miles of the inside mouths of Ocracoke, Hatteras, Oregon, or any other inlet north of Ocracoke inlet, connecting the waters of the Atlantic ocean with any of the sounds or other inland waters of North Caro-

lina, or shall fish with seines or nets of any description in the waters of Bear inlet or Brown's inlet or within one mile of Bear inlet or Brown's inlet, on the eastern or western beach of said inlets, except at regularly established fisheries on said Bear or Brown's inlet beaches, or shall fish with seines or nets on the inside of said Bear or Brown's inlet within one-fourth mile of said inlets between the first day of October and the first day of April, he shall be guilty of a misdemeanor.

1893, c. 216; 1903, c. 724; 1903, c. 416.

2456. Anchor nets in Albemarle sound. If any person shall set or fish an anchor, drift or staked gill net in the waters of Albemarle sound or its tributaries west of a line running from Skinner's Point buoy to Roanoke lighthouse, or if any person shall cast of said line set or fish in the waters of said sound or its tributaries any anchor, drift or staked gill net longer than one thousand yards, or combination of such nets longer than one thousand yards; or shall set or fish any anchor, drift or staked gill nets within one and one-half miles of any seine grounds on the said sound or rivers emptying therein or within one-half mile of any dutch net stand where the same is now located in said sound or rivers, unless said seine ground or dutch net stand is owned by the person setting such nets; or shall set or fish any line or row of anchor, drift or staked gill nets anywhere in said sound or rivers nearer to any other row of such nets than half the length of the longer of said row he shall be guilty of a misdemeanor and shall be fined not exceeding one hundred dollars or be imprisoned not more than thirty days. And any person who shall wilfully violate the provisions of this section shall forfeit and pay for each violation of the same the sum of one hundred dollars to be recovered in a civil action by any one who will sue therefor; one-half of said recovery shall inure to the benefit of the public school fund.

1897, c. 51; 1899, c. 41; 1899, c. 130.

2457. Pamlico county. If any person shall set or fish any dutch or pod nets in the waters of Pamlico county, or shall use any seine or drag net in the waters of said county including the north side of Neuse river from the mouth of the river to the mouth of upper Broad creek from the first day of May to the first day of January next ensuing, or shall at any time catch fish with a seine or drag net along the shores of said county on any day of the week except Monday, Wednesday and Friday, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days.

1885, c. 198; 1889, c. 544; 1893, c. 334.

2458. Dutch nets in Neuse river. If any person shall use or cause to be used any dutch net, pound net, or other stationary trap net, or seine of similar description by whatever name known, in the waters of Neuse river for the purpose of taking fish therefrom, except the ordinary set net in use in said river prior to the first day of January one thousand eight hundred and ninety-seven, he shall for each day's use thereof as aforesaid forfeit and pay the sum of fifty dollars. The penalties herein created shall be recovered by warrant before any justice of the peace in the county of Carteret, Craven and Pamlico, or Lenoir, and shall be applied to the use of the public schools of said counties, and such offender in addition to the penalties contained in this section shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars, nor more than five hundred dollars, or imprisoned in the county jail not less than six months nor more than twelve months: Provided, that a resident and citizen of the state may, upon the payment of an annual tax of fifteen dollars on each net, to the school fund of Pamlico county, fish with dutch, trap or pound nets in the waters of Neuse river on the Pamlico side of said river between the mouth of said river and Upper Broad creek not more than five hundred yards from the shore.

Code, s. 3397; 1897, c. 145; 1899, c. 299; 1899, c. 422; 1899, c. 435; 1901, c. 74; 1903, c. 704.

2459. Size of meshes for seines in Neuse and Trent rivers. If any person shall use any drag-net or seine with bars of a less size than one and a quarter inch in the Neuse and Trent rivers, or in any of the tributaries thereof, except for the purpose of catching herring, from the fifteenth day of January to the fifteenth day of May of each year, he shall be guilty of a misdemeanor, and fined not less than five nor more than fifty dollars for every offense. This section shall not apply to the waters of the Neuse and its tributaries above the Wayne and Johnston county lines.

Code, s. 3395; 1881, c. 146, ss. 1, 2.

2460. Fishing in Trent river. If any person shall set any trap, dutch, pound or pod net of any description whatever in Trent river, or shall at any time extend his set nets more than one-third the distance across the Trent river from either side, or shall set any net nearer to any other net than one hundred yards either on the same or on the opposite side of the river, or shall fish with seines or set nets of any description in Trent river from its mouth to upper Tucker bridge, between the hours of twelve o'clock noon on Saturday and twelve o'clock noon on Monday of each week, or shall set or haul a net or seine of any description between the town of Trenton and Brown's mill on said river from the sixteenth day of May to the first day of August in each year, he shall be guilty of a misdemeanor,

and shall be fined not less than five dollars nor more than ten dollars or be imprisoned not less than ten or more than thirty days.

Code, s. 3397; 1893, c. 447; 1897, c. 294.

2461. Fishing or shooting on bridges across Neuse or Trent river at New Bern. If any person being upon the bridges or either of them which span the Neuse and Trent rivers at the city of New Bern, shall fish in the waters of said rivers while being on said bridges, except with hand line not attached to any pole, or shall use fire or shoot any firearms while standing or being upon either of said bridges, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1901, c. 36; 1901, c. 326; 1903, c. 71.

2462. Setting nets across streams. If any person shall set a net of any description across the main channel of any river or creek, or shall erect, so as to extend more than three-fourths of the distance, across any such river or creek any stand, dam, weir, hedge or other obstruction to the passage of fish, or shall erect any stand, dam, weir, or hedge, in such part of any river or creek that may be left open for the passage of fish, or who having erected any dam where the same was allowed, and shall not make and keep open such slope or fishway as may be required by law to be kept open for the free passage of fish, he shall be guilty of a misdemeanor.

Code, ss. 3387, 3388, 3389.

2463. Hauling seines, Cherokee county. If any person shall fish with seines or drag-nets or place any finger or fall traps in the Valley river, Notla and Iliawassee rivers in the county of Cherokee, for the purpose of catching fish from said rivers, from the fifteenth of March to the first day of June in each year, he shall be guilty of a misdemeanor, and fined not less than ten, nor more than fifty dollars, or imprisoned not less than ten nor more than thirty days.

Code, s. 3399; 1881, c. 12; 1897, c. 293.

2464. License tax on nonresidents fishing with seines. If any person, not being a citizen and resident of this state, shall catch fish by seines, nets or other appliances for taking fish for marketable purposes in any waters within the jurisdiction of this state, without first obtaining therefor a license from the state treasurer and for which he shall pay a privilege tax of twenty-five hundred dollars per annum, he shall be guilty of a misdemeanor, and upon conviction in the superior court of any county contiguous to the waters so fished as aforesaid, shall be fined not exceeding three thousand dollars or imprisoned not exceeding two years, or be both fined and im-

prisoned, as aforesaid, in the discretion of the court; and any citizen of this state, or other person who shall form an alliance or co-partnership with a nonresident for the purpose of evading this section or who shall act as an agent of any such nonresident, or as his servant, agent or employee, shall be deemed guilty of a misdemeanor, and upon conviction in the superior court of any county bordering upon the waters fished as aforesaid, shall be fined not less than one hundred dollars or imprisoned not less than six months, or be both in the discretion of the court; and the nets, seines, boats or other appliances of such person shall be liable by civil action to seizure and confiscation for the benefit of the public school fund. Any person who shall violate this section shall forfeit and pay the sum of five hundred dollars for each day engaged in fishing as aforesaid, to be sued for and recovered by any citizen of this state, the one-half of such recovery to be to the use of such citizen so suing and recovering the same, and the other half to the school fund. In any civil action for the recovery of the penalties hereinbefore provided for and mentioned, no person, agent, servant or other employee shall be excused from testifying therein on the ground of incriminating himself by his answer, but such answer shall not be used as evidence against such witness so testifying in any criminal action whatsoever.

Code, s. 2202; 1897, c. 35; 1899, c. 52.

2465. Right to fisheries. Whenever any person shall acquire title to lands covered by navigable water under the chapter entitled Grants, the owner or person so acquiring title shall have the right to establish fisheries upon said lands; and whenever the owners of such lands shall improve the same by clearing off and cutting therefrom logs, roots, stumps or other obstructions, so that the said land may be used for the purpose of drawing or hauling nets or seines thereon for the purpose of taking or catching fish, then and in that case the person who makes or causes to be made the said improvements, his heirs and assigns, shall have prior right to the use of the land so improved, in drawing, hauling, drifting or setting nets or seines thereon, and it shall be unlawful for any person, without the consent of such owner, to draw or haul nets or seines upon the land so improved by the owner thereof for the purpose of drawing or hauling nets or seines thereon; and this section shall apply where the owner of such lands shall erect platforms or structures of any kind thereon to be used in fishing with nets and seines; and every person who shall wilfully destroy or injure the said platform or structures, or shall interfere with or molest the owner in the use of such lands as aforesaid, or in any other manner shall violate this section, shall be guilty of a misdemeanor: Provided, this section

shall not be so construed as to relieve any person from punishment for the obstruction of navigation.

Code, s. 3384; 1874-5, c. 183, ss. 1-6.

2466. Obstruction of fish in Hiawassee river. No person shall make, construct or build any dam, drag-net or seine across more than three-fourths of Hiawassee river, so as to prevent or hinder the free passage of fish in said river, and any person making or using any dam, drag-net or seine in said river shall leave open and unobstructed to the free passage of fish at least one-fourth of said river, in width, on the side most favorable to the passage of fish. Any person offending against this section shall be guilty of a misdemeanor, and fined not more than ten dollars for each twenty-four hours said river is so obstructed, one-half to the use of the school fund, the other half to the use of the county in which such violation occurs.

Code, s. 3398; 1881, c. 11, ss. 1, 2, 3.

2467. Regulated in certain streams. No person shall place or allow to remain any dam for mill or factory purposes in the Chowan river between Holliday's island and the Virginia line; in the Meherrin river between its mouth and the Virginia line; in the Roanoke river from the mouth of the Cashie river to the Virginia line; in the Dan river from the crossing of the state line to a point nearest Danbury; in the Neuse river from New Bern to Neuse station in Wake county; in Contentnea creek from its junction with the Neuse to the junction of Turkey and Moccasin creeks; in the Cape Fear river from Wilmington to the junction of Haw and Deep rivers and thence in Haw river to the line of Chatham and Alamance counties, and also in Deep river to the Randolph and Chatham line; in Rocky river from its mouth to the crossing of the Pittsboro and Ashboro road; in the New Hope river from its mouth to the Orange county line; in Northeast Cape Fear river from Wilmington to South Washington; in Black river from its mouth to the junction of the Coharie; in the South river from its junction with the Black river to the crossing of the Fayetteville and Warsaw public road; in Lumber river from the state line to the northern boundary of Robeson county; in the Yadkin river from the state line to Patterson's factory; in Elk creek, a tributary of the Yadkin river, from its mouth to Daniel Wheeler's in Watauga county; in Ararat river from its mouth to the bridge at Mount Airy; in Linville river from its mouth to Linville Falls; in North Fork of Catawba from its mouth to Turkey Cove; in Broad river from the state line to Reedy Patch creek; in Green river from its mouth to its junction with North Paolet; in the Ten-

nessee river from the state line to its junction with the Nantahala; in Pigeon river from the state line to the Forks of Pigeon; in the French Broad river from the state line to Brevard and in the Swannanoa river; in Toe river from the state line to the confluence of the North and South Forks of Toe; in New river from the state line to the point of divergence from the western boundary line of Alleghany county; in Little river in Johnston county from its junction with Neuse river; in Wayne county to the Wake county line; in Cain river from the mouth of same to mouth of Bolling creek in Yancey county, also Old Fields of Toe on North Toe river in Mitchell county; John's river from its mouth to the forks of said river near Carrell Moore's in Caldwell county; Catawba river from the South Carolina line to the town of Old Fort in McDowell county, unless the owner thereof shall construct thereon at his own expense a sluice-way for the free passage of fish, of a width not less than three feet nor more than ten feet: Provided, such sluice-way shall be constructed according to plans and specifications to be furnished by the board of agriculture, and shall not injure the water-power of such owner: Provided further, in order to ascertain whether sluice-ways will or will not injure the water-power aforesaid the owner of such dam may select two disinterested persons and the board of agriculture two others, who may select the fifth person to aid in the arbitration and settlement of such complaint: Provided further, this section shall not apply to Pigeon river in Haywood county: Provided also, it shall be lawful for any person to remove any obstruction in the main channel of the Cape Fear river to the width of one hundred feet, for the free passage of fish in the county of Harnett. This proviso, however, shall not apply to any dam or obstruction placed or kept upon said river by the Cape Fear Iron and Steel Company.

Code, s. 3410; 1901, c. 208; 1880, c. 34; 1881, cc. 21, 32, 250, 320.

2468. Sluice-ways kept open when constructed. The sluice-ways referred to in the preceding section shall be so constructed and placed upon such dams by the owner thereof within sixty days after notice has been given by the board of agriculture, under a penalty of one hundred dollars per day for each day thereafter that such dam shall remain without such sluice-way, and shall be kept open by him during the months of February, March, April, May, June, October and November, and at all other times when there is sufficient water to supply both the water-power and the sluice-way, a fine of fifty dollars per day for each day said sluice-way shall be allowed to remain closed, and any person who shall fish with net, trap, hook and line, or who shall take in any way whatsoever any fish within two hundred feet of said sluice-way shall be subject to a fine of one

dollar for each fish so taken, or a fine of fifty dollars for each offense, or imprisonment for thirty days.

Code, s. 3411; 1880, c. 34, s. 2.

2469. Obstructions removed. No other obstruction to the passage of fish shall exist or be built between the designated points in the streams mentioned in the two preceding sections unless an opening of not less than twenty-five feet, and not more than seventy-five feet, embracing the main channel of said streams, shall be made by the owner of such obstructions within twenty days after notice from the board of agriculture to make such opening under penalty of fifty dollars per day for each day such obstruction shall remain unopened. Said notice shall be served by the sheriff of the county, and his return shall be prima facie evidence of notice in any suit for such penalty.

Code, s. 3412; 1880, c. 34, s. 3.

2470. Vessel injuring nets. If any master or other person having the management or control of a vessel or boat of any kind, in the navigable waters of the state, shall wilfully, wantonly, and unnecessarily do injury to any seine or net, which may be lawfully hauled, set or fixed in said waters for the purpose of taking fish, he shall forfeit and pay to the owner of such seine or net, or other person injured by such act, one hundred dollars, and shall be guilty of a misdemeanor.

Code, ss. 3385, 3389.

2471. Use of dynamite for killing fish. If any person shall use any dynamite or any other explosive agent whatever for killing fish, or shall explode any dynamite or other explosive agent in the public waters of the state where fish are found, except for mechanical or manufacturing purposes, he shall be guilty of a misdemeanor and fined not less than fifty dollars or imprisoned not less than thirty days. The possession of fish killed by explosive agencies shall be prima facie evidence that explosives were used for the purpose of killing fish.

Code, s. 3405; 1889, c. 312.

2472. When nonresident may use seines. If any person who has not resided in the state continuously for at least twelve months next preceding the day on which he shall begin to take fish shall use, or cause to be used, in any of the waters of the state, any weir, hedge, net, or seine, for the purpose of taking fish for sale or exportation, or if any person shall assist in using, or be interested in using or causing to be used, in any such waters for the purpose aforesaid, any weir, hedge, net, seine or tongs in the use of which any such nonresident person may have an interest, he shall be guilty of

a misdemeanor. Nothing herein shall prevent any person from fishing with seines hauled to the shore at any fishery, the title to which fishery or any interest therein having been acquired by such person by purchase or inheritance. This section shall not extend to servants employed to fish by any person allowed to fish in the navigable waters of the state: Provided, no nonresident of the state shall make any sale, assignment or transfer of any fishery, weir, or other fishing apparatus, or privilege mentioned in this section, to any citizen of the state for the purpose of operating and working said fishery, weir, or other fishing apparatus as aforesaid, under the name and ownership of such citizen, or as the servant or employee of any citizen; and any sale, transfer or assignment not made bona fide and for a full consideration, shall be null and void. Upon affidavit founded upon information and belief that any nonresident of the state is operating any such fishery, weir, or other fishing apparatus as aforesaid in the waters of the state, under such sale, assignment or transfer, as the pretended servant or employee of any citizen of the state, it shall be the duty of the justice of the peace before whom said affidavit is made, to issue a warrant against the said nonresident and citizen under whose name said fishery is operated, and upon conviction the said offenders shall be guilty of a misdemeanor, and shall, for every offense, be fined not more than fifty dollars, or imprisoned not more than thirty days. Upon the said trial, the burden of proof shall be on the defendants to prove the bona fides and full consideration of said sale or transfer.

Code, ss. 3379, 3380; R. C., c. 81, s. 5; 1844, c. 40, s. 1; 1876-7, c. 33; 1883, c. 171.

2473. In New Hanover County. If any person shall use any net for catching sturgeon in the waters of New Hanover county, the bars of the meshes of which net shall be less than ten inches in the diamond; or if any person shall fish any seine or net in the waters of said county between the first day of January and the first day of July of each year, or shall haul a seine or nets or pod fish within three hundred yards of any established fishery, except with the nets of such fishery; or shall set or fish any stationary nets in the waters of the Cape Fear river, except on the east side thereof and in New Hanover county; or shall set any net in said river otherwise than east or west, or shall own or control more than one line of nets, or shall operate or fish any shad nets in Cape Fear river below the mouth of Brunswick river between the fifteenth day of April and the first day of January of any year; or shall set any set net or stationary net of any kind in the Cape Fear river north of the mouth of the Brunswick river, or in the Brunswick river; or shall operate any drift net in the Cape Fear river of more than three hundred yards in length, or shall catch shad in said river with seines or nets

from the fifteenth of May to the first of January, he shall be guilty of a misdemeanor. The possession of a sturgeon net with meshes of a size smaller than allowed by this section shall be *prima facie* evidence of having fished the same. In setting nets in Cape Fear river as allowed by this section the following rules shall prevail: They shall begin at a point one hundred yards from the edge of the channel on the east side of said river and running thence due east one hundred and twenty yards, then leaving a gap of one hundred and twenty yards. Then from the east end of said gap another net may be set one hundred and twenty yards only, and to continue in the same proportion, always requiring a gap of one hundred and twenty yards to intervene between each one hundred and twenty yards of nets so set, and no net or sets of nets of any kind shall be placed opposite said gaps, within a distance of a half mile of same, and none of the nets so set shall be nearer than a half mile of the west shore of said Cape Fear river. An established fishery in the meaning of this section is one where there is a camp for the use of the hands, and where the seine or nets and boats used by the said fishery are kept, and where the said fishery was established prior to the first day of January one thousand eight hundred and ninety-nine.

Code, s. 3403; 1901, c. 173; 1899, c. 440; 1881, c. 280.

2474. Northeast Cape Fear. If any person shall fish in the northeast branch of the Cape Fear river with seine, net or trap, from the twenty-third day of February to the first day of July of any year, between the hours of six o'clock p. m. on Saturday and six o'clock p. m. on Monday of each week, or shall at any time use more than one seine at a time in any fishing hole in said river, or use, set or place in said river any hedge, trap or other obstruction which will prevent the free passage of fish up said river, which said hedge, trap or other obstruction shall extend more than one-third across the main channel of the said river, he shall be guilty of a misdemeanor. This section shall not apply to that portion of said river which lies between the city of Wilmington and a point on said river known as The Three Cypresses, twelve miles distant from said city of Wilmington.

1889, c. 182; 1891, c. 198.

2475. In Brunswick, New Hanover and Pender Counties. If any person shall use in any of the waters of Brunswick, New Hanover and Pender counties any nets, seines, set-downs, fish traps or any other nets of any description for the purpose of taking fish, the bars of the meshes of which nets, seines, set-downs, or fish traps shall be less than one and one-eighth inches in length; or shall with seines or nets of any kind, catch any fish in the waters of the Cape Fear

river from its mouth to the Bladen county line, or in the waters of the Northeast Cape Fear or Black rivers in Pender county between six o'clock p. m. on Tuesday and six o'clock p. m. on Wednesday, or shall obstruct the free passage of fish in the waters of said rivers, he shall be guilty of a misdemeanor.

1885, c. 226; 1887, c. 71.

2476. In Black river and Mingo creek. If any person shall fish in that part of Black river in Sampson and Cumberland counties and below the Atlantic Coast Line Railway Bridge, or in Mingo creek in said counties below the Averagesboro and Clinton road otherwise than with a hook and line, he shall be guilty of a misdemeanor.

1895, c. 276.

2477. In certain streams in Cumberland, New Hanover, Brunswick and Sampson counties. If any person shall catch or destroy with seines, nets, firearms, bows and arrows, or by muddying or stirring the waters, or by striking any fish of any kind in the waters of Black or South rivers, or the waters of Big Coharie, Little Coharie, Bear Skin and Big Swamps in the counties of New Hanover, Sampson, Cumberland and Harnett, and of the waters of Six Runs in the counties of New Hanover and Sampson, and of the waters of the Cape Fear river in the counties of New Hanover and Brunswick, and of the northeast branch of the Cape Fear river in the county of New Hanover, between the fifteenth days of May and August of each year, he shall be guilty of a misdemeanor, and fined not to exceed five dollars.

Code, s. 3409; 1889, c. 414; 1871-2, c. 152; 1879, c. 283; 1881, c. 369.

2478. Obstructions in South Fork river. No person or corporation shall place or allow to remain in the South Fork river, from its mouth in Gaston county to its forks in Catawba county, any obstruction to the free passage of fish up said stream: Provided, this section shall not apply to milldams where the owners thereof shall construct a sufficient fishway over said dams at least ten feet wide which will allow fish to pass over said dams: Provided further, this section shall not apply to dams in existence, or which may be erected for manufacturing or milling purposes. The violation of this section shall be a misdemeanor.

Code, s. 3406; 1879, c. 244, ss. 1, 2; 1881, c. 90.

2479. Obstructions in Neuse river. Any person who shall construct a dam, put in traps, dutch net, wire seine, or anything else in Neuse river between its mouth and the Falls of Neuse in Wake county, for the purpose of obstructing the passage of fish in said river shall be guilty of a misdemeanor and be fined not exceeding

fifty dollars or imprisoned not exceeding thirty days: Provided, this section shall not apply to seines, set nets, running or skimming nets: Provided, this section shall not prevent the use of traps in Wayne county, where the trap and its wings do not extend more than one-third across the stream.

Code, s. 3422; 1885, c. 391; 1893, c. 354; 1883, c. 301, ss. 1, 2; 1895, c. 403; 1901, c. 395.

2480. Regulated in Lumber river. It shall be unlawful for any person to use any seine, net or gig, or, by muddying the water or by shooting, to catch, take or kill fish in the Lumber river by any means except the ordinary rod, line and hook, from the first day of March to the first day of November in each and every year; and any person violating this section shall be guilty of a misdemeanor, and shall pay a fine of forty dollars, or be imprisoned not more than twenty days.

Code, s. 3404; 1881, c. 288, ss. 1, 2; 1883, cc. 13, 78.

2481. Fishways to be erected in Haw river. All persons maintaining dams across Haw river in the county of Chatham shall, upon thirty days' notice from the board of commissioners of said county, establish fishways in said dams; and if said fishways shall not be made within three months from the service of the notice, said persons so offending shall be guilty of a misdemeanor, and fined at the discretion of the court.

Code, s. 3402; 1881, c. 343, ss. 1, 2.

2482. Regulated in Nantahala river. If any person shall use any drag-net, basket or seine for the purpose of catching fish in Nantahala river or its tributaries, he shall be guilty of a misdemeanor, and fined not less than five nor more than twenty dollars for each offense, one-half to go to the school fund of the county where such offense is tried, and the other half to the informer; and whenever the Nantahala river forms the dividing line between any counties persons offending against this section may be prosecuted and punished in the courts of any of the counties between which the said river constitutes the dividing line.

Code, s. 3401; 1881, c. 30, ss. 1, 3.

2483. Robbing nets. If any person shall, without authority of the owner, take any fish from any nets of any kind, he shall be guilty of a misdemeanor.

Code, s. 3418; 1883, c. 137, s. 5.

2484. Obstructions in certain streams in Henderson county. No person shall make, construct or build any dam, drag-net or seine across more than three-fourths of the French Broad, Mills, Green or

Broad rivers, or any of their tributaries, in Henderson county, so as to prevent or hinder the free passage of fish in said rivers and their said tributaries, and any person making or using any dam, drag-net or seine in said streams, shall leave open and unobstructed to the free passage of fish at least one-fourth of said streams, in width, on the side most favorable to the passage of fish. Any person offending against this section shall be fined not more than ten dollars for each twenty-four hours said streams are so obstructed, one-half to the party suing for the same, and the other half to the school fund in said county; and any person violating this section shall, in addition to the penalty prescribed, be guilty of a misdemeanor: Provided, this section shall not apply to dams for manufacturing purposes.

Code, s. 3425; 1885, c. 58.

2485. Trout in Cataloochee creek, Haywood county. If any person shall fish for trout in Cataloochee creek or its tributaries in Haywood county, and offer such trout for sale as a matter of traffic, or shall fish for trout in such streams without permission from the owners of the land contiguous thereto, he shall be guilty of a misdemeanor and be fined not more than twenty dollars or imprisoned not more than ten days.

1885, c. 61.

NOTE. For manner of establishing prior right of fishery, see ss. 1680, 1681.

CHAPTER 61.

PARTITION.

| | Sections. |
|--------------------------|-----------|
| I. Procedure, | 2486—2497 |
| II. Lands in two states, | 2498—2502 |
| III. Personal property, | 2503—2505 |
| IV. Sale of land, | 2506—2515 |
| V. Sale for public use, | 2516 |
| VI. Sale of personalty, | 2517—2518 |

I. PROCEDURE.

2486. As in special proceedings. The procedure in all cases for partition, under this chapter, shall be the same, in all respects, as prescribed by law in other special proceedings, except as modified herein.

Code, s. 1923; 1868-9, c. 122, s. 33.

2487. Venue. The proceedings for partition, actual or by sale, must be instituted in the county where the land lies. If the land to be partitioned lies in more than one county, the proceedings may be instituted in either of the counties.

Code, s. 1898; 1868-9, c. 122, s. 7.

2488. Petition filed; commissioners appointed. The superior courts on petition of one or more persons claiming real estate as tenants in common, shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common.

Code, s. 1892; 1868-9, c. 122, s. 1.

2489. Unknown persons interested, representative appointed. If, upon the filing of a petition for partition it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to, and can not after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. If after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall in its discretion appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented.

1887, c. 284.

2490. How commissioners summoned; their duty. The commissioners, who shall be summoned by the sheriff, or any constable, must meet on the premises and partition the same among the tenants in common, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. If there be any of the tenants in common whose names are not known or whose title is in dispute the share or shares of such persons shall be set off together as one parcel.

Code, s. 1894; 1887, c. 284, s. 2; 1868-9, c. 122, s. 3.

2491. Oath of commissioners. The commissioners shall be sworn by a justice of the peace, or other person authorized to administer

oaths, to do justice among the tenants in common, in respect to such partition, according to their best skill and ability.

Code, s. 1893; 1868-9, c. 122, s. 2.

2492. Commissioners may employ surveyor. The commissioners are authorized to employ the county surveyor, or in his absence, or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners.

Code, s. 1895; 1868-9, c. 122, s. 4.

2493. Report; contents; impeached, when. The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk, and if no exception thereto be filed within twenty days, the same shall be confirmed: Provided, that any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided further, that innocent purchasers for full value and without notice shall not be affected thereby.

Code, s. 1896; 1868-9, c. 122, s. 5.

2494. Confirmation; effect; where registered. Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns.

Code, s. 1897; 1868-9, c. 122, s. 6.

2495. Owelty bears interest. The sums of money due from the more valuable dividends shall bear interest until paid.

Code, s. 1899; 1868-9, c. 122, s. 8.

2496. Owelty charged against minors, when payable. When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum the money shall not be payable until such minor arrives at the age of twenty-one years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian shall have assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure.

Code, s. 1900; 1868-9, c. 122, s. 9.

2497. Delay by commissioner. If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed.

Code, s. 1901; 1868-9, c. 122, s. 10.

II. LANDS IN TWO STATES.

2498. Procedure. Whenever on the death of any person, his lands in this state, and in another state, shall descend or be devised to several persons, who, by the law of this and the other state, shall hold in the lands undivided estates as tenants in common, or by any other undivided tenancy, and such heirs or devisees can not, without suit, have partition for want of consent, or because of inability in any of the co-tenants, then, if such deceased person shall have been at the time of his death, a resident of the state, or not then a resident of any of the states, in which his lands lie, and in the last case the most valuable part of such lands shall lie in this state, such heir or devisee, or any person claiming under him, may file a petition in the superior court for the county where the deceased resided at his death, or where any part of the land lies in this state, setting forth all the lands in which the plaintiff has an undivided estate, without and within the state, described by their names and boundaries, or by the adjoining tracts, and also the estate the deceased had in them, and the supposed value of the lands in each state, and the share, in severalty, to which the plaintiff and each of his cotenants is entitled under the laws of the several states, and praying for partition to be made of all the tracts, according to their respective interests, and the material facts set forth in the petition shall be verified by the affidavit of the plaintiff or his guardian, or other person, at the discretion of the court; and all persons concerned in interest in the lands shall be made parties, according to the practice of the superior court in this state.

Code, s. 1911; 1868-9, c. 122, s. 20.

2499. When court may decree partition. On the hearing of the petition, the court may decree a partition; and shall allot in severalty to each tenant his just share of the lands, according to the value of his interest in the same, by the laws of the several states, in which they are situated.

Code, s. 1912; 1868-9, c. 122, s. 21.

2500. Commissioners appointed, when; their duty; final decree; deed compelled; effect of decree. The court making such decree shall issue a commission to three respectable freeholders in this or any state where any part of the land may lie, unconnected

by blood or interest with the parties, directing them or a majority of them, to make partition between the cotenants, plaintiffs and defendants in said petition, and to assign each his respective share in the value, in severalty, in any tract or tracts, in any or all the states; and before making the allotment the commissioners shall make a valuation of all the lands held by the cotenants in all the said states; and where they can not, without injury to the value of some shares, make an exact division of the lands, they shall charge the more valuable dividends with money to be paid to the tenants of a less valuable dividend to make equality of partition, and they shall report their proceedings as they may be directed, and the report shall contain a valuation of all the estate in this and the other states, and the division among the cotenants according to such valuation; and the court may confirm such report, or on sufficient cause shown, may correct and alter, or set it aside and order a new commission; and where any sum is charged upon a more valuable dividend, the court may direct, if the tenant taking such a dividend be an infant, that the sum charged shall not be paid till a future day, and the same shall bear interest at a rate not greater than allowed in this state: Provided, that the tenant of the larger dividend may discharge himself from accruing interest by paying the whole amount due at any time; and the sum due from the greater dividend shall be a charge on the land into whose hands soever it may come, although it may be taken without notice; and the court shall, upon the confirmation of any report of the commissioners, make a final decree. And where all the parties are within the jurisdiction of this court, the court shall, by the usual proceedings, direct and compel the parties to execute and deliver deeds and assurances, sufficient, by the laws of this state and the other states, to give the partition full force and validity in all the states; and in case any of the parties are under such disabilities that they can not execute such assurances, or are without the jurisdiction of the court, then the court, upon receiving evidence from the plaintiff that, by a law of the other state in which lie the parts of the lands described in the petition to be without this state, the decree can have effect thereon, shall direct the decree to be enrolled, and a copy of it shall be registered in the register's office of all the counties within this state where any of the lands lie; and a copy shall also be furnished to the plaintiff or other party interested, duly certified, to the end that, as to the lands without this state, it may be carried into effect in the state in which the said lands may be, in such manner as said state may direct; and on satisfactory evidence being made to the court in this state that the decree may have full effect by the law of such other state, the court in this state shall by its decree declare the partition in the land in this state to be final and conclusive; and the decree shall be firm and irreversible.

as hereinafter provided; and shall, on registration as aforesaid, pass to the tenants the title in severalty to the lands in this state in the same manner as if all the land mentioned in the decree were situate within this state.

Code, s. 1913; 1868-9, c. 122, s. 22.

2501. When decree of another state enforced. Where real estate may be partly in this state and partly in another state, and the deceased person from whom it was derived by descent or devise, was, at the time of his death, a resident of some other state, or was a resident of none of the states in which he held lands, and in this last case, the lands of which he was seized in this state were of less value than the lands of which he was seized in any other state, the courts of the state in which such deceased person had his residence at his death, or in which he held lands of greater value than those he held in this state, shall have full power and authority, under any law passed by the legislature of such state, substantially in accordance with the provisions herein made on this subject, to decree partition of the lands in this state, together with those within such other state, in the same manner as if the whole real estate were within the jurisdiction of such court, and in the same manner as the courts in this state are directed and authorized to do by the preceding section, as to the lands of deceased persons resident here at their death, or leaving lands of greater value here than in any other state; and in case any person having an interest in the final decree, made as aforesaid in another state, as to lands in this state, shall, within twelve months after the same may be entered up in the courts of said state, produce the records and proceedings of such courts of record duly certified to a superior court of any county in this state, where any of the lands of this state lie, the court, on petition ex parte in such case, shall order such proceedings to be entered of record in the court of this state, and order that the said decree shall be of the same force and validity as if it had been a decree of the court in this state in which the petition is filed, upon a petition and regular proceedings had thereon, and the decree of the court of such other state, and the proceedings on it by petition in the superior court in this state confirming it and giving it validity, being enrolled in the said court of this state and registered in all the counties where the lands lie in this state, shall pass the lands in this state, according to the decree, and shall vest estates in severalty therein declared, as to said lands, in the same manner and with the same effect in law as if the lands in this state had been so allotted on a petition for partition, according to the provisions of the former sections of this chapter.

Code, s. 1914; 1868-9, c. 122, s. 23.

2502. Decree in another state, how validity passed on. Where a copy of a decree and proceedings of a suit in any other state shall be produced, as in the preceding section, and also when it is necessary for a superior court to be certified that its decree of a partition of lands without this state and within the territory of another state, can have effect therein, it shall be competent for the judge of the superior court before which the existence of a law in such other state is to be proved, to decide whether any act of the legislature of such state has been passed.

Code, s. 1915; 1868-9, c. 122, s. 24.

III. PERSONAL PROPERTY.

2503. How made. When any persons entitled as tenants in common of personal property desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose; and the court, if it think the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment, to divide such property as nearly equal as possible among the tenants in common.

Code, s. 1917; 1868-9, c. 122, s. 27.

2504. Commissioners to report; exceptions; confirmation. The commissioners shall report their proceedings under the hands of any two of them, and file their report in the office of the clerk of the superior court within five days after the partition was made, and if no exception thereto be filed within twenty days, the same shall be confirmed: Provided, that any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided further, that innocent purchasers for full value and without notice shall not be affected thereby.

Code, s. 1918; 1868-9, c. 122, s. 28.

NOTE. For pay of commissioners, see Salaries and Fees, ss. 2797-2799.

IV. SALE OF LAND.

2505-6. Part sold and part divided. In all proceedings under this chapter actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder, or a part only, of any land held by tenants in common may be partitioned and the remainder held in common.

1887, c. 214, s. 1.

2507. Expectancy may be sold. The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate.

1887, c. 214, s. 2.

2508. Life tenant and remainderman may sell; life estate valued. In all proceedings for partition of land whereon there is a life estate, the life tenant may join in the proceeding and on a sale the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually; or in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely.

1887, c. 214, s. 3.

Note. See also s. 2515.

2509. Timber trees may be sold; life tenant's estate valued. Whenever two or more persons shall own, as tenants in common, or coparceners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, on which there may be standing timber trees, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales, to be ascertained under the mortuary tables.

1895, c. 187.

2510. Disputed ownership of one share; sale ordered, and ownership reserved. If in any partition proceeding two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding.

1887, c. 284, s. 4.

2511. When sale ordered; terms. Whenever it appears by satisfactory proof that an actual partition of the lands can not be

made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof, on such terms as to size of lots, place or manner of sale, time of credit and security for payment of purchase money, as may be most advantageous to the parties concerned, and, on the coming in of the report of sale and confirmation thereof, and payment of the purchase money, the title shall be made to the purchaser or purchasers at such time and by such person as the court may direct, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession. And the deed of the officer shall convey to the purchaser such title and estate in the property as the tenants in common had.

Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31.

2512. Who may sell; confirmation; impeaching. The court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding; but no clerk of any court shall appoint himself or his deputy to make sale of real property or other property in any proceeding before him. Such officer or person shall file his report of sale giving full particulars thereof, within ten days after the sale, in the office of the clerk of the superior court, and if no exception thereto is filed within twenty days, the same shall be confirmed: Provided, that any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided further, that innocent purchasers for full value and without notice shall not be affected thereby.

Code, s. 1906; 1899, c. 161; 1868-9, c. 122, s. 15.

2513. How sale advertised. The notice of sale, under this proceeding, shall be the same as required by law on sales of real estate by sheriff under execution.

Code, s. 1905; 1868-9, c. 122, s. 14.

2513a. Confirmation of report in sale for division. Upon confirmation of the report, the court shall secure to each tenant in common his ratable share in severalty of the proceeds of sale.

Code, s. 1921; 1868-9, c. 122, s. 31.

2514. How proceeds of sale secured to infants, etc. When a sale is made under this chapter, and any party to the proceedings be an infant, a married woman, non compos mentis, imprisoned, or beyond the limits of the state, or when the name of any tenant in common is not known, it shall be the duty of the court to decree

the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative.

Code, s. 1908; 1887, c. 284, s. 3; 1868-9, c. 122, s. 17.

2515. Land partitioned or sold, subject to dower; dower sold.

When there is dower or right of dower on any land, petitioned to be sold or divided in severalty by actual partition, the woman entitled to dower or right of dower therein may join in the petition. The land to be divided in severalty shall be allotted to the tenants in common, subject to the dower right or dower, and either may be asked and assigned at the same time that partition thereof is made and by same commissioners. On a decree of sale, the interest of one-third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, the value of an annuity of six per cent. on such third, during her probable life, shall be ascertained and paid to her absolutely out of the proceeds.

Code, s. 1909; 1893, c. 341; 1868-9, c. 122, s. 18.

NOTE. See also s. 2507.

V. SALE, PUBLIC USE.

2516. Land required for public use, how sold. When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands, or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof; whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary, in the manner and on the terms it deems expedient. And the expenses, fees and costs of this proceeding shall be paid in the discretion of the court.

Code, s. 1907; 1868-9, c. 122, s. 16.

NOTE. See ss. 1775, 1877, 2588.

VI. SALE OF PERSONALTY.

2517. When ordered; how made. If a division of personal property owned by any persons as tenants in common can not be had without injury to some of the parties interested, and a sale thereof be deemed necessary, the court shall order a sale to be made by some officer of the court or other competent person, who shall file

his report of sale in the office of the clerk of the court within ten days after sale, and if no exception thereto be filed within twenty days, the same shall be confirmed: Provided, that any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided further, that innocent purchasers for full value and without notice shall not be affected thereby.

Code, s. 1919; 1868-9, c. 122, s. 29.

2518. How sale advertised; terms. The sale shall be made after twenty days' notice, by advertisement in three or more public places in the county, and shall be on such terms as the court may direct.

Code, s. 1920; 1868-9, c. 122, s. 30.

NOTE. For compensation of commissioners under this chapter, see Salaries and Fees.

CHAPTER 62.

PARTNERSHIP.

- I. Limited partnership,
- II. Surviving partners,

Sections.
2519—2537
2538—2545

I. LIMITED PARTNERSHIP.

2519. For what purposes formed. Limited partnerships for the transaction of any mercantile, manufacturing or mechanical business within the state may be formed by two or more persons, upon the terms and with the rights and powers and subject to the conditions and liabilities in this chapter; but its provisions shall not be construed to authorize any such partnership for the conducting of a banking or insurance business, other than writing or soliciting insurance.

Code, s. 3088; 1860-1, c. 28.

2520. General and special partners joined; liability of special. Such partnerships may consist of one or more persons, who are general partners, and are jointly and severally responsible as partners are now by law, and of one or more persons, who contribute in actual cash payments a specific sum as capital to the common

stock, who are called special partners, and who are not liable for the debts of the partnership beyond the funds so contributed to the capital.

Code, s. 3089; 1860-1, c. 28, s. 2.

2521. Must make certificate; what to contain. The persons desirous of forming such partnership must make and severally sign a certificate containing: First, the name or firm under which such partnership is to be conducted; second, the general nature of the business to be transacted; third, the names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence; fourth, the amount of capital which each special partner has contributed to the common stock; fifth, the period at which such partnership is to commence and terminate.

Code, s. 3090; 1860-1, c. 28, s. 3.

2522. Registration of certificate. The certificate must be acknowledged or proved before some one competent to take the probate of deeds and ordered registered in the same manner as provided for deeds, and must be registered in the county in which the principal place of business of such partnership is situated. If the partnership has places of business in different counties, a transcript of the certificate and acknowledgment certified by the register must be registered and filed in the register's office of each of such counties.

Code, ss. 3091, 3092; 1860-1, c. 28, ss. 4, 5.

2523. Affidavit of payment of cash. At the time the certificate is ordered to be registered an affidavit of one or more of the general partners shall be made before the judge or clerk taking such acknowledgment, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually in good faith paid in cash, and the said affidavit so made shall be registered with the original certificate.

Code, s. 3093; 1860-1, c. 28, s. 6.

2524. Registration essential. No such partnership shall be deemed to have been formed until such certificate and affidavit have been made, acknowledged or proven and registered as required in the preceding sections.

Code, s. 3094; 1860-1, c. 28, s. 7.

2525. False statement, all general partners. If any false statement is made in such certificate or affidavit, all the persons interested in such partnership shall be liable as general partners.

Code, s. 3095; 1860-1, c. 28, s. 8.

2526. Publication of terms of. The terms of the partnership must be published immediately after its formation for six successive weeks, in at least one newspaper in the same county or near the place of said partnership business, and if such publication be not made, the partnership shall be deemed general.

Code, s. 3096; 1860-1, c. 28, s. 9.

2527. Affidavits of publication filed. Affidavits of such publication, made by the proprietor of such newspaper in which the same is published, may be filed with the clerk of the superior court of the county in which such business is conducted, and shall be evidence of the fact.

Code, s. 3097; 1860-1, c. 28, s. 10.

2528. Renewals and continuances. Every renewal or continuance of such partnership beyond the time originally fixed for its duration must be certified, acknowledged and registered, and an affidavit of a general partner made and filed, and notice given by publication as required for its original formation, and every such partnership which is otherwise continued must be deemed a general partnership: Provided, the affidavit herein required may state that the amount of cash therein specified had been originally paid in good faith, and that it is represented by goods or merchandise then on hand, and has not been impaired in the course of trade.

Code, s. 3098; 1860-1, c. 28, s. 11.

2529. Alteration in names, etc., a dissolution. Every alteration which is made in the names of the partners, in the nature of the business, in the capital or shares thereof or in any other matter specified in the original certificate must be deemed a dissolution of the partnership; and any such partnership which is in any manner carried on after such alteration has been made must be deemed a general partnership, unless renewed as a special partnership, according to the preceding sections.

Code, s. 3099; 1860-1, c. 28, s. 12.

2530. Name of firm. The business of the partnership must be conducted under a firm, in which the names of the general partners only are inserted, without the addition of the word "company" or any other general term, except the word "limited;" and if the name of any special partner is used in the firm with his privity, he shall be deemed a general partner.

Code, s. 3100; 1899, c. 75; 1860-1, c. 28, s. 13.

2531. Actions as in general partnership. Suits in relation to the business of the partnership may be brought and conducted by

and against the general partner in the same manner as if there was no special partner.

Code, s. 3101; 1860-1, c. 28, s. 14.

2532. Special stock not withdrawn. No part of the sum which any special partner has contributed to the capital stock must be withdrawn by or paid to him in the shape of dividends, profits or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest does not reduce the original amount of such capital; and if, after the payment of such interest, any profits remain to be divided, he may receive his portion of such profits.

Code, s. 3102; 1860-1, c. 28, s. 15.

2533. Depleted capital made good, when. If it appears by the payment of interest or profits to any special partner that the original capital has been reduced, the partner receiving the same is bound to restore the amount necessary to make good his share of the capital without interest.

Code, s. 3103; 1860-1, c. 28, s. 16.

2534. Rights of special partner. A special partner may from time to time examine into the state and progress of the partnership concern; may advise as to its management and act as attorney at law, but must not transact any other of the partnership business, nor be employed for that purpose as agent or otherwise; and if he interfere contrary to this section he is deemed a general partner.

Code, s. 3104; 1860-1, c. 28, s. 17.

2535. Accounting inter se. The general partners are liable to account to each other, and to the special partners for their management of the partnership, as other partners.

Code, s. 3105; 1860-1, c. 28, s. 18.

2536. Effect of insolvency. In case of the bankruptcy or insolvency of the partnership, no special partner, under any circumstances, is to be allowed to claim as a creditor until the claims of all the other creditors of the partnership are satisfied.

Code, s. 3107; 1860-1, c. 28, s. 20.

2537. Dissolution. No dissolution of such partnership by the acts of the parties must take place before the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of its dissolution has been registered in the register's office

in which the original certificate was registered, and published once a week for four successive weeks in the nearest newspaper to each of the places where the partnership transacts its business.

Code, s. 3108; 1860-1, c. 28, s. 21.

II. SURVIVING PARTNERS.

2538. Inventory by, in sixty days; copy to personal representative. When a member of any partnership dies the surviving partner, within sixty days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, a copy of which inventory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner.

1901, c. 640.

2539. On refusal of, personal representative may take inventory; receiver appointed, when. If the surviving partner neglect or refuse to have said inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of the preceding section. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for said partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law.

1901, c. 640, s. 2.

2540. Notice to creditors. Every surviving partner, within thirty days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within twelve months from date of first publication of said notice. The notice shall be published once a week for four weeks in a newspaper (if there be any) published in the county where the partnership existed. If there should be no newspaper published in the county, then the said notice shall be posted at the courthouse and four other public places in the county.

1901, c. 640, s. 3.

2541. Debts without lien paid pro rata. All debts and demands against a copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership.

1901, c. 640, s. 4.

2542. Action on claim not presented in twelve months. In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the surviving partner shall not be chargeable for any assets that he may have paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner.

1901, c. 640, s. 5.

2543. Appraisal for purchase by surviving partner; when he can not purchase; approval of clerk. The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner's estate, and the third named by the two appraisers selected, whose duty it shall be to make out, under oath, a full and complete inventory and appraisal of the entire assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, and to deliver the same to the surviving partner, and shall also deliver a copy to the executor or administrator. The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of said deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets. In case such surviving partner shall avail himself of the privileges of purchasing said interest as provided for in this section, he shall give bond to said executor or administrator with surety for the payment of the debts and liabilities of said partnership, and for performance of all contracts for which said partnership is liable: Provided, that when the original articles of copartnership in force at the death of any partner or the will of a deceased partner makes the provisions

for the settlement of such deceased partner's interest in said partnership, and for a disposition thereof different from that provided for in this chapter, the interest of such deceased partner in such partnership shall be settled and disposed of in accordance with the provisions of such articles of copartnership or of said will. In case of such sale of the real estate belonging to the partnership, the title to such real estate so purchased shall not pass until said sale of real estate is reported to and confirmed by the clerk of the superior court in the county in which said partnership was located, in a special proceeding in which the widow, heirs at law or devisees of such deceased partner are duly made parties.

1901, c. 640, s. 6.

2544. Accounting in twelve months; time extended; commissions. In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within twelve months from the death of the deceased partner, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court, and in no case to exceed five per cent. out of the share of the deceased partner.

1901, c. 640, s. 7.

2545. Accounting compelled. In case any surviving partner fail to come to a settlement with the executor or administrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as provided for by law in the case of executors and administrators.

1901, c. 640, s. 8.

CHAPTER 63.

RAILROADS.

| | Sections. |
|------------------------------|-----------|
| I. Creation, | 2546—2555 |
| II. Municipal subscriptions, | 2556—2560 |
| III. Charter forfeited, | 2561—2563 |
| IV. Corporate powers, | 2564—2572 |
| V. Eminent domain, | 2573—2596 |
| VI. Construction, | 2597—2601 |
| VII. Servants and police, | 2602—2608 |
| VIII. Operation of trains, | 2609—2615 |
| IX. Passengers, | 2616—2627 |
| X. Freight, | 2628—2635 |
| XI. Overcharges, | 2636—2638 |
| XII. Miscellaneous, | 2639—2642 |

I. CREATION.

2546. How chartered; number of incorporators; name, and route of company stated; amount of capital stock; where filed.

Any number of persons, not less than twenty-five, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained and operated, the length of such road as near as may be, and the name of each county in this state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than five thousand dollars for every mile of road constructed or proposed to be constructed, and the number of shares of which said capital stock shall consist, and the names and places of residence of six directors of the company, who shall manage its affairs for the first year, or until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the succeeding section, such articles of association may be filed in the office of the secretary of state, who shall indorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and

all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations by this chapter.

Code, s. 1932; 1871-2, c. 138.

2547. Stock subscribed before articles filed; affidavit of directors; organization fee paid secretary of state. Such articles of association shall not be filed and recorded in the office of the secretary of state until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and five per cent. paid thereon in good faith, and in cash, to the directors named in said articles of association; nor until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed and five per cent. paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association, which affidavit shall be recorded with the articles of association, as aforesaid; nor until said directors shall pay to the secretary of state the sum of fifty dollars, which said sum shall be paid by the secretary of state to the state treasurer.

Code, s. 1933; 1871-2, c. 138, s. 2.

2548. Copy of articles filed and recorded presumptive evidence of incorporation. A copy of any articles of association filed and recorded in pursuance of this chapter and of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of state, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated.

Code, s. 1934; 1871-2, c. 138, s. 3.

2549. When and how subscription books opened. When such articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in said articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole of the capital stock is subscribed.

Code, s. 1935; 1871-2, c. 138, s. 4.

2550. Number of directors; term of office; vote by shares; qualification of officers; how purchaser of railroad to become incorporated. There shall be a board of six directors, one of whom

shall be elected president, of every corporation formed under this chapter to manage its affairs. The directors shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it. And whenever the purchaser or purchasers of real estate, track and fixtures of any railroad corporation which has heretofore been sold or may be hereafter sold by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court shall acquire title to the same in the manner prescribed by law, such purchaser or purchasers may associate with him and them any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation with all the powers, privileges and franchises, and be subject to all the provisions of this chapter.

Code, s. 1936; 1871-2, c. 138, s. 5.

2551. What officers and agents president and directors may appoint. The president and directors shall appoint a treasurer and secretary and such other officers and agents as shall be prescribed by the by-laws.

Code, s. 1937; 1871-2, c. 138, s. 6.

2552. Stock may be paid for by instalments; nonpayment forfeits. The directors may require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed in such manner and in such instalments as they may deem proper. If any stockholder shall neglect to pay any instalment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock and all previous payments thereon forfeited for the use of the company, but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or by depositing the same in the postoffice, prop-

erly directed to him at the postoffice nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in said notice, and that if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice shall be served as aforesaid at least sixty days previous to the day on which payment is required to be made.

Code, s. 1938, 1871-2, c. 138, s. 7.

2553. Capital stock, when and how increased. In case the capital stock of any railroad company is found to be insufficient for constructing and operating its road, such company may, with the concurrence of two-thirds in amount of all its stockholders, increase its capital stock from time to time to any amount required for the purposes aforesaid. Such increase must be sanctioned by a vote in person or by proxy of two-thirds in amount of all the stockholders of the company, at a meeting of such stockholders called by the directors of the company for that purpose, by a notice in writing to each stockholder, to be served on him personally or by depositing the same, properly folded and directed to him, at the postoffice nearest his usual place of residence, in the postoffice at least twenty days prior to such meeting. Such notice must state the time and place of the meeting and its object and the amount to which it is proposed to increase the capital stock. The proceedings of such meeting must be entered on the minutes of the proceedings of the company, and thereupon the capital stock of the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders of the company aforesaid.

Code, s. 1939; 1871-2, c. 138, s. 9.

2554. Liability of stockholders; how stockholder made liable; when execution issues against. Each stockholder of any such company shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company and all the stockholders of any such company shall be jointly and severally liable for the debts due and owing to any of its laborers and servants, other than contractors, for personal services for thirty days' service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution shall be the amount recoverable with costs against such stockholders. Before such laborer or servant shall charge such stockholders for such thirty days' service he shall give them notice in writing within twenty days after the performance of such service

that he intends to hold them liable and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned; and every such stockholder, against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in said corporation in ratable proportion to the amount of the stock they shall respectively hold with himself.

Code, s. 1940; 1871-2, c. 138, s. 10.

2555. Liability of trustee, guardian or executor holding stock.

No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholders of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner and to the same extent as the testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name.

Code, s. 1941; 1871-2, c. 138, s. 11.

II. MUNICIPAL SUBSCRIPTIONS.

2556. Counties may aid railroads. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company when necessary to aid in the construction of any railroad in which the citizens of the county may have an interest.

Code, s. 1996; 1868-9, c. 171, s. 1.

2557. How made. The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them, and submitted to the people subject to all the rules, regulations and restrictions of other stockholders in such company or companies: Provided, that the

counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper.
Code, s. 1997; 1868-9, c. 171, s. 2.

2558. Election for, held. All elections ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the general assembly. The votes shall be compared by the boards of county commissioners who shall make a record of the same.

Code, s. 1998; 1868-9, c. 171, s. 3.

2559. How interest on bonds paid. In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent., when the principal on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of paying the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

Code, s. 1999; 1868-9, c. 171, s. 4.

2560. How taxes for bonds collected. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal, shall be collected by the sheriff in like manner as other state taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this chapter.

Code, s. 2000; 1868-9, c. 171, s. 5.

III. CHARTER FORFEITED.

2561. By preference to shippers. In the event of any contract having been entered into by any railroad company in this state with any person or company, whereby preferences or exclusive rights of transportation, either in priority or in arrangements, is given to such person or company, the attorney general is hereby instructed to institute proceedings against such railroad company for a forfeiture of its charter.

Code, s. 1869; 1865-6, resolution ratified December 14, 1865.

2562. By failure to begin in two years or to complete in ten. If any railroad corporation shall not within two years after its articles of association are filed and recorded in the office of the secretary of state, or the passage of its charter, begin the construction of its road and expend thereon ten per cent. of the amount of its capital, or shall not finish the road and put it in operation in ten years from the

time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease.

Code, s. 1980; 1871-2, c. 138, s. 43.

2563. Company dissolved, owner or purchaser a corporation.

When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law.

Code, s. 2005.

IV. CORPORATE POWERS.

2564. This chapter applicable to all railroads. All existing railroad corporations within this state shall respectively have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions of this chapter not inconsistent with their charters. And this chapter shall govern and control, anything in any special act of assembly creating a railroad corporation to the contrary notwithstanding, unless in the act of the general assembly creating the corporation the section or sections of this chapter intended to be repealed shall be specially referred to by number and, as such, specially repealed.

Code, ss. 701, 1982; 1871-2, c. 138, s. 45.

2565. General powers. Every railroad corporation shall have power:

1. ENTRY ON LAND; SURVEYS.

To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

2. VOLUNTARY GRANTS.

To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

3. HOLDING PROPERTY.

To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation.

4. GRADE OF ROAD.

To lay out its road, not exceeding one hundred feet in width, and to construct the same, and for the purpose of cuttings and embankments to take as much more land as may be necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this chapter for lands taken for the use of the company.

5. OBSTRUCTIONS NOT ALLOWABLE.

To construct its road across, along, or upon any stream of water, watercourse, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch, but the company shall restore the stream or watercourse, street, highway, plankroad and turnpike road thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstructions across, in, or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstructions may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon, or across any streets in any city without the assent of the corporation of such city.

6. CROSSING, INTERSECTING, ETC., OF RAILROADS.

To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its connections. And every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations can not agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in this chapter in respect to acquiring title to real estate.

7. RIGHT TO CARRY PERSONS AND PROPERTY.

To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor.

8. ERECTION OF NECESSARY BUILDINGS.

To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

9. REGULATION OF TIME AND MANNER OF TRANSPORTATION.

To regulate the time and manner in which passengers and property shall be transported and the compensation to be paid therefor; and such compensation for any passenger and his ordinary baggage shall not exceed five cents per mile.

10. BORROW MONEY ON MORTGAGE.

From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage its corporate property and franchises and secure the payment of any debt contracted by the company for the purposes aforesaid, and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of said company at any time under such regulations as the directors may see fit to adopt.

11. MAY LEASE RAILS AND REMOVE AT END OF TERM.

Any railroad or company may lease iron rails to any person or corporation for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

12. MAY AID IN THE CONSTRUCTION OF CONNECTING ROADS OR BRANCH LINES; EXCEPTION.

Any railroad or other transportation company shall have the right to aid in the construction of any railroad or branch railroad in this or an adjoining state connected with it directly or indirectly, if the construction of such railroad or branch railroad is authorized by law.

13. MAY ACQUIRE OR GUARANTEE STOCKS OR BONDS OF CONNECTING LINE.

Any railroad or other transportation company may acquire and hold or guarantee, or endorse the bonds or stocks of, or may lease any railroad or branch railroad, or other transportation line in this or an adjoining state.

14. MAY ESTABLISH HOTELS; EXCEPTION.

To purchase, lease, hold, operate or maintain eating-houses, hotels and restaurants for the accommodation of the traveling public along the line of their respective roads.

Code, s. 1957; 1885, c. 108; 1887, c. 341; 1889, c. 518; 1871-2, c. 138, s. 29.

2566. Highways crossed. Whenever the track of a railroad constructed by a company shall cross a railroad, a highway, turnpike or plankroad, such highway, turnpike or plankroad may be carried under or over the track as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, the said company may take such additional lands for the construction of such road, highway, turnpike or plankroad on such new line as may be deemed requisite by the directors. Unless the lands so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in this chapter for acquiring title to real estate, and duly made by said corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway, turnpike or plankroad in such manner and by such tenure as the adjacent parts of the same highway, turnpike or plankroad may be held for highway purposes.

Code, s. 1954; 1871-2, c. 138, s. 26.

Note. For liability of railroads, etc., to keep up bridges and crossings, see ss. 2704, 2705.

2567. Not to obstruct roads or ways. Whenever, in their construction, the works of any of said corporations shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same.

Code, s. 1710; R. C., c. 61, s. 30; 1874-5, c. 83.

2568. When company may turn roads. In order to prevent the frequent crossing of such roads or ways, or in cases where it may be necessary to occupy the same, the corporation may change the roads and ways so as to avoid such crossing and occupation, and to such points as may be deemed expedient.

Code, s. 1711; R. C., c. 61, s. 31; 1874-5, c. 83.

2569. Damages paid, when road turned. For any injury done to the lands of persons by taking them under the preceding section, the value thereof shall be assessed in like manner as is provided for assessing damages to real estate for taking lands for railroads as in this chapter provided.

Code, s. 1712; R. C., c. 61, s. 32; 1874-5, c. 83.

2570. Established roads not impeded until new road made.

Before any part of an established road or way shall be impeded by any of said corporations, the new road or way shall be prepared and made equally good with the portion proposed to be discontinued; and then the same shall be deemed a part of the original road or way, and shall be kept up and repaired as before the change.

Code, s. 1713; R. C., c. 61, s. 33; 1874-5, c. 83.

2571. Route changed. The directors of every company may by a vote of two-thirds of their whole number at any time alter or change the route or any part of the route of their road if it shall appear to them that the line can be improved thereby, and shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route, as if the road had been located there in the first instance; and no such alteration shall be made in any city or town after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the corporate authorities of said city or town; and in case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. And when any route or line is abandoned in the exercise of the power herein granted, full compensation shall be made by the company for all money, labor, bonds or material contributed to the construction of the road-bed or its superstructure by those so interested by their contributions in the abandoned route or line. All the provisions of this chapter relative to the first location and to acquiring title to land shall apply to every such new or altered portion of the route.

Code, s. 1953; 1871-2, c. 138, s. 25; 1889, c. 391; 1893, c. 396, s. 3.

2572. Merger of; certificate to secretary of state; effect. Any railroad corporation or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do to be entered on their minutes, become ex officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof as provided by law; and whenever the whole of said capital stock shall have been so surrendered or transferred, and

a certificate thereof filed in the office of the secretary of state under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the said corporation whose stock shall have been so surrendered or transferred, shall thereupon vest in and be held and enjoyed by the said corporation to whom such surrender or transfer shall have been made, as fully and entirely and without charge or diminution as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation to whom such surrender or transfer of the said stock shall have been made in the corporate name of such corporation. But the property, rights, franchises and profits of every corporation so surrendered, transferred or leased, shall hereafter always be liable to taxation, and shall never be exempt therefrom. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected thereby, nor shall existing liabilities or the rights of creditors of the corporation where stock shall have been so surrendered or transferred be in any way affected or impaired by this section.

Code, s. 1994; 1871-2, c. 138, s. 57.

V. EMINENT DOMAIN.

2573. What companies may exercise. Every railroad, street railway, plankroad, tramroad, turnpike, and canal company, for the purpose of constructing their road or canal, may at any time enter upon the lands through which they may desire to conduct their road or canal, and lay out the same as they may desire; and they may also enter on such contiguous land along the route as may be necessary for depots, warehouses, engine-sheds, workshops, water-stations, toll-houses, and other buildings necessary for the accommodation of their officers, servants and agents, horses, mules and other cattle, and for the protection of their property; and shall pay to the proprietors of the land, so entered on, such sum as may be agreed on between them. Telegraph, telephone, electric power or lighting, public water supply and incorporated bridge companies may exercise the right of eminent domain under the provisions of this subchapter.

Code, s. 1698; R. C., c. 61, s. 9; 1852, c. 92, s. 1; 1874-5, c. 83.

2574. May take material from adjacent lands. For the purpose of constructing its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the company may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom any wood, stone, gravel or earth, which may be deemed necessary: Provided,

that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees.

Code, s. 1702, R. C., c. 61, s. 22; 1874-5, c. 83.

2575. How material paid for. If for the value of the damages done to the owner by reason of the acts in the preceding section mentioned, the parties may be unable to agree, the same shall be valued in the manner hereinafter provided.

Code, s. 1703; R. C., c. 61, s. 23; 1874-5, c. 83.

2576. Dwelling-house and burial grounds cannot be condemned. No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden or burial ground.

Code, s. 1701; R. C., c. 61, s. 21; 1852, c. 92, s. 1; 1874-5, c. 83.

2577. Proceedings when parties can not agree. If any company possessing by law the right of eminent domain in this state is unable to agree for the purchase of any real estate required for the purposes of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this chapter.

Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1901, cc. 6, 41, s. 2; 1899, c. 64; 1903, cc. 562, 159, s. 16; 1871-2, c. 138, s. 13.

2578. Petition filed; contains what; copy served. For the purpose of acquiring such title such company, or the owner of the land sought to be condemned, may present a petition to the clerk of the superior court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the company, it must contain a description of the real estate which the company seeks to acquire; and it must, in effect, state that the company is duly incorporated, and that it is the intention of the company in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of such public business, and the specific use of such land; that the land described in the petition is required for the purpose of conducting the proposed business, and that the company has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the company or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, or as near as may be, must be

stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or incumbrances on said real estate as the company or the owner may see fit to make. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the hearing of the same by the court.

Code, s. 1944; 1893, c. 396; 1871-2, c. 138, s. 14.

2579. How process served. The summons and a copy of the petition shall be served in the same manner as in special proceedings.

Code, s. 1944; 1871-2, c. 138, s. 14.

2580. Service where parties unknown. If the person on whom such service of summons and petition is to be made is unknown, or his residence is unknown and can not by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in a paper, if there be one, printed in the county where the land is situate, once in each week, for four weeks previous to the time fixed by the court, and if there be no paper printed in said county, then in a newspaper printed in the city of Raleigh.

Code, s. 1944, subsec. 5.

2581. When court may direct how papers to be served. In all cases not herein otherwise provided for, services of orders, notices, and other papers in the special proceedings authorized by this chapter may be made as in other special proceedings.

Code, s. 1944, subsec. 7.

2582. Answer to petition; hearing; commissioners appointed. On presenting such petition to the superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners.

Code, s. 1945; 1871-2, c. 138, s. 15.

2583. Powers and duties of commissioners. The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpoenas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet except by the appointment of the court or pursuant to adjournment, they shall cause ten days' notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the real estate appraised by them. They shall report the same to the court within ten days.

Code. s. 1946; 1871-2, c. 138, ss. 16, 17, 18.

2584. Report of commissioners, form of. When the commissioners shall have assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of County:

We,, commissioners appointed by the court to assess the damages that have been and will be sustained by, the owner of certain land lying in the county of, which the company proposes to condemn for its use, do hereby certify that we met on (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely to be occasioned by the works of the company, and all other inconveniences likely to result to the owner, we have estimated and do assess the damages aforesaid at the sum of \$.....

We have estimated the special benefits which the said owner will receive from the construction of said works to be the sum of \$.....

Given under our hands, the day of A. D.

Code, s. 1700; R. C., c. 61, s. 17; 1874-5, c. 83.

2585. Exceptions to report; hearing; appeal; when title vests; restitution, when. Within twenty days after filing the report the company or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the supreme court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall

seem right and proper. If the said company, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said company may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the company, and upon the payment by said company of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the company aforesaid. A certified copy of said judgment under the seal of the court shall be registered in the county where the land is situated, and a copy of the same, or the original certified, may be given in evidence in all actions and proceedings, as deeds for land are now allowed to be read in evidence. All real estate acquired by any company under and pursuant to the provisions of this chapter, for the purpose of its incorporation, shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of said company, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to said company. And the company shall have no right to hold said land not condemned, but shall surrender the possession of the same on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings.

Code, s. 1946; 1893, c. 148.

2586. Jury trial on exceptions to report, when. In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire rights of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court in term, if upon the hearing of such appeal a trial by a jury be demanded.

1893, c. 148.

2587. When benefits exceed damage, company pays costs. In any case where the benefits to the land caused by the erection of

the railroad, street railway, telephone, telegraph, water supply, bridge, or electric power or lighting plant are ascertained to exceed the damages to the land, then the said company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damage.

1891, c. 160.

2588. Title of infants, persons non compos, and trustees without power of sale, acquired. In case any title or interest in real estate required by any company for the purpose of its incorporation shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot or person of unsound mind, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, idiot, or person of unsound mind, to sell and convey the same to such company for the purpose of its incorporation, on such terms as may be just; and in case any such infant, idiot or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land having legal power to sell and convey the same.

Code, s. 1956; 1871-2, c. 138, s. 28.

Note. See also, ss. 1775, 1877, 2516.

2589. Rights of claimants of fund determined. If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the company, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made.

Code, s. 1947; 1871-2, c. 138, s. 19.

2590. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed. The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown,

and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services, which shall be taxed in the bill of costs. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or to cause new parties to be added and to direct such further notices to be given to any party in interest, as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse, neglect to serve or be incapable of serving.

Code, s. 1948; 1871-2, c. 138, s. 20.

2591. Court may make rules of procedure in. In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts.

Code, s. 1949; 1871-2, c. 138, s. 21.

2592. Change of ownership pending proceeding. When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or any interest therein or of the subject matter of the appraisal, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made.

Code, s. 1950; 1871-2, c. 138, s. 22.

2593. Defective title, how cured. If at any time after an attempt to acquire title by appraisal of damages or otherwise it shall be found that the title thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency, and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the company on account thereof, on such company paying into court a sufficient sum or giving security as the court may direct to pay the compensation therefor when finally ascertained, and in every such case the party interested in such real estate may conduct the proceedings to a conclusion if the company delays or omits to prosecute the same.

Code, s. 1951; 1871-2, c. 138, s. 23.

2594. Title to state lands acquired. The secretary of state shall have power to grant to any railroad company, any land belonging to the people of this state which may be required for the purposes of its road, on such terms as may be agreed on by them, or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon.

Code, s. 1955; 1871-2, c. 138, s. 27.

Note. For condemnation for water supplies, see ss. 3029, 3030, 3031.

2595. Widths which may be condemned for certain purposes.

1. **RIGHT OF WAY OF RAILROAD.**—The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width.

2. **PLANKROADS, ETC.**—No greater width of land than sixty feet shall be condemned for the use of any plankroad, tramroad, canal, street railway or turnpike.

3. **DEPOT OR STATION.**—No greater quantity of land than two acres, contiguous to any railroad, plankroad, tramroad, turnpike or canal shall be condemned at one place for a depot or station.

Code, ss. 1707, 1708, 1709; R. C., c. 61, ss. 27, 28, 29; 1852, c. 92; 1874-5, c. 83.

2596. No railroad, etc., to be established unless authorized by law. If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tramroad, railroad or plankroad, with the intent that the same shall be used to transport passengers other than such persons, or the members of such corporation, or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay fifty dollars for every person and article of produce so transported. This section shall not apply to any narrow-gauge railroad or tramroad, the principal business of which is the transportation of logs, lumber and articles for the owners of such railroad or tramroad.

Code, s. 1717; R. C., c. 61, s. 37; 1874-5, c. 83; 1901, c. 282.

VI. CONSTRUCTION.

2597. Map of route served with petition. Whenever it shall become necessary to condemn any land for the purposes of a railroad, at the time that the summons for such condemnation is

served, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the heights of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are located. This section shall not apply to street railways.

Code, s. 1952; 1893, c. 396, s. 2; 1901, c. 6, s. 3; 1871-2, c. 138, s. 24.

2598. Map of railroad made and filed. Every railroad corporation shall, within a reasonable time after their road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and file the same in the office of the corporation commission. Every such map shall be drawn on a scale and on paper to be designated by the corporation commission, and certified and signed by the president or engineer of such corporation.

Code, s. 1977; 1871-2, c. 138, s. 41.

2599. Cattle guards; plantation roads. Every incorporated company owning, operating or constructing, or which shall hereafter own, operate or construct, or any company which shall hereafter be incorporated, and shall own, operate or construct any railroad passing through and over the land of any person now enclosed, or which may hereafter become enclosed, shall, at its own expense, construct and constantly maintain in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from said enclosed land, and they shall also make and keep in constant repair crossings to any plantation road thereupon. Every such corporation which shall fail to erect and constantly maintain such cattle guards and crossings shall be liable to an action for damages to any party aggrieved.

Code, s. 1975; 1883, c. 394, ss. 2, 3.

2600. When two companies may jointly construct a line. Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Upon the making of such an agreement, the company that is not to construct the part of the line which is common to both may terminate its line at the point of intersection, and may reduce its capital to a sum of not less than five thousand dollars for each mile of the road proposed to be constructed.

Code, s. 1983; 1871-2, c. 138, s. 46.

2601. When may be constructed partly in another state. Whenever after due examination it shall be ascertained by the directors of any railroad company that a part of the line of railroad proposed to be made between any two points in this state ought to be located and constructed in an adjoining state, it may be so located and constructed by a vote of two-thirds of all the directors, and the sections of said railroad within this state shall be considered a connected line, and the directors may reduce the capital specified to such amount as may be deemed proper, but not less than the amount required by law for the number of miles of railroad to be actually constructed in this state.

Code, s. 1984; 1871-2, c. 138, s. 47.

VII. SERVANTS AND POLICE.

2602. Conductors and other employees to wear badge, when on duty. Every conductor, baggage master, engineer, brakeman, or other servant of any railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property.

Code, s. 1958; 1871-2, c. 138, s. 30.

2603. May apply to governor to appoint police. Any railroad corporation on which steam is used as the motive power may apply to the governor to commission such persons as the said corporation may designate to act as policemen for said corporation.

Code, s. 1988; 1871-2, c. 138, s. 51.

2604. Governor may appoint and issue commission. The governor upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to such person or persons so appointed a commission to act as such policemen.

Code, s. 1989; 1871-2, c. 138, s. 52.

2605. Oath and powers of special policemen. Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath; such oath, with a copy of the commission, shall be filed with the corporation commission and a certificate thereof by its clerk shall be filed with the clerk of each county

through or into which the railroad for which such policeman is appointed may run and in which it is intended he shall act, and such policeman shall severally possess within the limits of the county all the powers of policemen in the several towns, cities and villages in which they shall be so authorized to act as aforesaid.

Code, s. 1990; 1871-2, c. 138, s. 53.

2606. Police to wear badge when on duty. Such railroad police shall, when on duty, severally wear a metallic shield with the words Railway Police and the name of the corporation for which appointed inscribed thereon, and said shield shall always be worn in plain view except when employed as detectives.

Code, s. 1991; 1871-2, c. 138, s. 54.

2607. Compensation of police. The compensation of such police shall be paid by the companies for which the policemen are respectively appointed as may be agreed on between them.

Code, s. 1992; 1871-2, c. 138, s. 55.

2608. Dismissal of police; notice, where filed. Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, it may file a notice to that effect in the several offices in which notice of such appointment was originally filed, and thereupon the power of such officer shall cease and be determined.

Code, s. 1993; 1871-2, c. 138, s. 56.

VIII. OPERATION OF TRAINS.

2609. Trains to run on schedule; schedule published; must transport freight and passengers. Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises.

Code, s. 1963; 1871-2, c. 138, s. 35.

2610. How cars arranged in passenger train. In forming a passenger train, baggage, freight, merchandise or lumber cars shall

not be placed in rear of the passenger cars, except in case of accident, or when the cars are provided with automatic couplers or brakes.

Code, s. 1971; 1871-2, c. 138; 1893, c. 331; 1895, c. 212.

2611. What trains may run on Sunday. No railroad company shall permit the loading or unloading of any freight car on Sunday; nor shall permit any car, train of cars, or locomotive to be run on Sunday on any railroad, except in case of accident and except such as may be run for the purpose of transporting the United States mails and passengers with their baggage, and ordinary express freight in express cars exclusively, and except such as shall be run for the purpose of transporting fruits, vegetables, live stock and perishable freights. Where there are not sufficient cars of live stock or other perishable freights to make a complete train, or section of a train, the company may add other cars to complete the same: Provided, the word Sunday in this section shall be construed to embrace only that portion of the day between sunrise and sunset; and trains in transitu, having started on Saturday, may, in order to reach the terminus or shops, run until nine o'clock a. m. on Sunday, but not later, nor for any other purpose than to reach the terminus or shops.

Code, s. 1973; 1879, cc. 97, 203; 1885, c. 92; 1897, c. 126; 1901, c. 444.

2612. Fast mail trains authorized; one train a day in each direction required. The corporation commission is hereby empowered, whenever it shall appear wise and proper to do so, to authorize any railroad company to run one or more fast mail trains over its road, which shall only stop at such stations on the line of the road as may be designated by the company: Provided, that in addition to such fast mail train said railroad shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: Provided further, that nothing in this section shall be construed as preventing the running of local passenger trains on Sunday.

1893, c. 97.

2613. Vestibule fronts on street railway cars. All street passenger railway companies shall use vestibule fronts, of frontage not less than four feet, on all passenger cars run by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year: Provided, that such companies shall not be required to close the sides of the vestibules: Provided further, such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather, not to exceed four days in any one month within

the period herein prescribed for use of vestibule fronts. The corporation commission is hereby authorized to make exemptions from the provisions of this section in such cases as in their judgment the enforcement of this section is unnecessary.

1901, c. 743.

2614. Street railways to have fenders in front of passenger cars. All street passenger railway companies shall use practical fenders in front of all passenger cars run by them. The corporation commission is hereby authorized to make exemptions from the provision of this section in such cases as in their judgment the enforcement of this section is unnecessary.

1901, c. 743, s. 2.

2615. May seize and use fuel. If any railroad or other transportation company finds it necessary, in order to prevent delays in the transportation of freight or passengers, to take possession of coal, wood or other fuel not its own property and convert it to its own use without an agreement with the owner thereof, it shall notify such owner within three days of such taking and shall, within a period of thirty days, pay for such coal, wood or other fuel at the invoice price at place of shipment, plus ten per cent. Should the transportation company fail to notify the consignee or owner within such three days or pay for said coal, wood or other fuel at the invoice price at place of shipment, plus ten per cent. as above provided, within thirty days after converting the same to its own use it shall in addition forfeit to the party aggrieved the sum of twenty-five dollars for the first day of failure to notify such consignee of such appropriation of said fuel, or their failure to pay for the same, and five dollars for each day thereafter in which they shall fail to notify such consignee or pay for the same.

1903, c. 590, s. 4.

IX. PASSENGERS.

2616. First and second class accommodations. All railroad companies shall furnish first and second class passenger accommodations.

1899, c. 384, s. 4.

2617. Separate accommodations for different races. All railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire, other than street railways, shall provide separate but equal accommodations for the white and colored races at passenger stations or waiting rooms, and also on all trains and steamboats carrying passengers. Such accommodations may be furnished by railroad companies either by separate passen-

ger cars or by compartments in passenger cars, which shall be provided by the railroads under the supervision and direction of the corporation commission: Provided, that this shall not apply to relief trains in cases of accident, to Pullman or sleeping cars, or through express trains that do not stop at all stations and are not used ordinarily for traveling from station to station, to negro servants in attendance on their employers, to officers or guards transporting prisoners, nor to prisoners so transported.

1899, c. 384; 1901, c. 213.

2618. Corporation commission may exempt certain roads and trains. The corporation commission is hereby authorized to exempt from the provisions of the preceding section steamboats, branch lines and narrow-gauged railroads and mixed trains carrying both freight and passengers, if in its judgment the enforcement of the same be unnecessary to secure the comfort of passengers by reason of the light volume of passenger traffic, or the small number of colored passenger travelers on such steamboats, narrow-gauge, branch lines or mixed trains.

1899, c. 384, s. 2; 1901, c. 213.

2619. When two races put in same coach. When any coach or compartment car for either race shall be completely filled at a station where no extra coach or car can be had, and the increased number of passengers could not be foreseen, the conductor in charge of such train may assign and set apart a portion of a car or compartment assigned for passengers of one race to passengers of the other race.

1899, c. 384, s. 3.

2620. Penalty for failing to provide separate cars. Any railroad company failing to comply in good faith with the provisions of the three preceding sections shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger on any train or boat of any railroad or steamboat company which is required by this chapter to furnish separate accommodations to the races, who has been furnished accommodations on such railroad train or steamboat in a car or compartment with a person of a different race in violation of law.

1899, c. 384, s. 5.

2621. Must check baggage; liable for loss. A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of such corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to

the passenger or person delivering the same on his behalf; and if such check be refused on demand the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the conductor in charge of the train, and on producing said check, if his baggage shall not be delivered to him, he may, by an action, recover the value of said trunk or baggage.

Code, s. 1970; 1871-2, c. 138, s. 36.

2622. Baggage handled carefully. All railroad and steamboat companies shall handle with care all baggage and freights placed with them for transportation, and they shall be liable in damages for any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight, while the same is under their control; and upon proof of injury to baggage or freight in the possession or under the control of any such company, it shall be presumed that the injury was caused by the negligence of the company.

1897, c. 46.

2623. Ticket to intoxicated man refused. The ticket agent of any railroad, steamboat or other transportation company shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated.

1885, c. 358.

2624. May prevent intoxicated person from entering. The conductor, captain or other person in charge of any railroad car, steamboat, or other conveyance for the use of the traveling public, shall at all times have power to prevent any intoxicated person from entering such car, boat, or other conveyance.

1885, c. 358, s. 2.

2625. Unused tickets to be redeemed. When any round-trip ticket is sold by a railroad or transportation company it shall be the duty of such company to redeem the unused portion of said ticket by allowing to the holder thereof the difference between the cost thereof and the price of a one-way ticket between the stations for which such round-trip ticket was sold. Whenever any one-way or regular ticket is sold by a railroad or transportation company, and not used by the purchaser, it shall be the duty of the company selling the ticket to redeem it at the price paid for it. All railroad and transportation companies shall redeem all mileage tickets known as five-hundred, thousand and two-thousand mile tickets, sold by them, if presented within a year from the date of the sale, in money, or shall allow the original holder to ride it out.

1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418.

2626. Injury to passengers on platform, etc. In case any passenger on any railroad shall be injured while on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passenger cars then in the train, such company shall not be liable for the injury: Provided, said company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers.

Code, s. 1978; 1871-2, c. 138, s. 42.

2627. Refusing to pay fare, may eject. If any passenger shall refuse to pay his fare, or violate the rules of the corporation, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling-house, as the conductor shall elect, on stopping the train.

Code, s. 1962; 1871-2, c. 138, s. 34.

X. FREIGHT.

2628. Freight rates posted. It shall be the duty of all railroad and other transportation companies to keep posted in a conspicuous place in their depots or places where freight is received for shipment a list of its charges for carrying freight, specifying name of place, class of freight and charge for carrying the same. Such charges shall not be increased without giving fifteen days' notice, and the company represented by any agent refusing to comply with this section shall be liable to a penalty of not less than fifty nor more than one hundred dollars.

Code, s. 1965; 1879, c. 182, s. 2.

2629. Penalty for failure to receive. Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or work-house at which there is no agent, notice shall

be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment.

Code, s. 1964; 1903, cc. 444, 693.

2630. Failure to transport in the state; penalty. If any railroad, steamboat, express or other transportation company shall omit or neglect to transport any freight received by it and billed to or from any place in this state for shipment, for a longer period than four days after the receipt of same, unless otherwise agreed upon between the company and the shipper; or, unless the same be burned, stolen or otherwise destroyed, to allow any such goods or merchandise to remain at any intermediate point more than forty-eight hours, unless otherwise provided for by the corporation commission, such company shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars for each and every day of such unlawful detention thereafter, in case such shipment is made in carload lots; but if made in less quantities the forfeiture shall be twelve dollars and fifty cents for the first day and two dollars and fifty cents for each succeeding day: Provided, the forfeiture shall not be collected for more than thirty days.

1903, c. 590, s. 3.

2631. Unclaimed freight sold. Every railroad, steamboat, express or transportation company which shall have had unclaimed freight, not perishable, in its possession for a period of six months, may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation and storage of such freight and the expenses of advertising and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in a state paper and also in a newspaper published at or nearest the place at which such freight was directed to be left, and also at the place where such sale is to take place. The expenses incurred for advertising shall be a lien upon such freight in a ratable proportion according to the value of each article, package or parcel, if more than one.

Code, s. 1985; 1871-2, c. 138, s. 48.

2632. Unclaimed perishable freight. In case such unclaimed freight shall in its nature be perishable, then the same may be sold as soon as it can be, on giving the notice required in the preceding section, after its receipt at the place where it was directed to be left.

Code, s. 1986; 1871-2, c. 138, s. 49.

2633. Funds from unclaimed freight go to university. Such railroad, steamboat, express or transportation company shall make

an entry of the balance of the proceeds of the sale, if any, of each parcel of freight owned by or consigned to the same person, as near as can be ascertained, and at any time within five years thereafter shall refund any surplus so retained to the owner of such freight, his heirs or assigns, on satisfactory proof of such ownership; if no person shall claim such surplus within five years, said surplus shall be paid to the university.

Code, s. 1987; 1871-2, c. 138, s. 50.

2634. Through freight and travel. The directors representing the stock held in the various railroad corporations are hereby authorized and empowered to enter into such agreements and terms with each other as to secure through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads of said corporations or companies, and rolling stock thereof, on such terms as may be agreed upon by the directors of said corporations or companies.

Code, s. 1995; 1866-7, c. 105.

2635. Charges on partial freight deliveries. Whenever any freight of any kind shall be received by any common carrier in this state to be delivered to any consignee in this state, and a portion of the same shall not have been received at the place of destination, it shall not be lawful for the carrier to demand any part of the charges for freight or transportation due for such portion of the shipment as shall not have reached the place of destination. The carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received upon the payment or tender of the freight charges due upon such portion. But nothing in this section shall be construed as interfering with, or depriving a consignor, or other person having authority, of his rights of stoppage in transitu.

1893, c. 495.

XI. OVERCHARGES.

2636. Not to receive more than tariff rate. No railroad, steamboat, express or other transportation company engaged in the carriage of freight, and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages, more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law.

1903, c. 590.

2637. Overcharge on tariff rates refunded. In case of any overcharge, contrary to the preceding section, the person aggrieved may file with any agent of the company collecting or receiving greater compensation than the amount allowed in the preceding section a written demand, supported by a paid freight bill and an original bill of lading or duplicate thereof for refund of overcharge, and a maximum period of sixty days shall be allowed such company to pay claims filed under this section.

1903, c. 590, s. 2.

2638. Penalty for failure to refund overcharge. Any company failing to refund such overcharge, within the time allowed, shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars per day for each day's delay thereafter until said overcharge is paid, together with all costs incurred by the party aggrieved: Provided, the total forfeiture shall not exceed one hundred dollars.

1903, c. 590, s. 2.

XII. MISCELLANEOUS.

2639. Live stock killed, negligence presumed. When any cattle or other live stock shall be killed or injured by the engines or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the company in any action for damages against such company: Provided, no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued.

Code, s. 2326; 1856-7, c. 7.

2640. Injuries by negligence of fellow-servants; defective machinery. Any servant or employee of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void.

1897 (Pr.), c. 56.

2641. How action brought for penalties. All penalties imposed by this chapter may, unless otherwise provided, be sued for in the name of the state.

Code, s. 1976; 1885, c. 221.

2642. Officials to account to successors. The president and directors of the several railroads, and all persons acting under them, are hereby required upon demand to account with the president and directors elected or appointed to succeed them, and shall transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company.

Code, s. 2001; 1870-1, c. 72, ss. 1, 3.

NOTE. For other statutes affecting railroads, see Corporation Commission.

CHAPTER 64.

REGISTER OF DEEDS.

| | Sections. |
|----------------|------------|
| I. Office of, | 2643--2648 |
| II. Duties of, | 2649--2661 |

I. OFFICE OF.

2643. Seal of office. The office of register of deeds for every county in the state shall have and use an official seal, which seal shall be provided by the county commissioners of the several counties, and shall be of the same size and design as the seals now used by the clerk of the superior court, with the words Office of Register of Deeds, the name of the county and the letters North Carolina surrounding the figures.

1893, c. 119, s. 1.

2644. Election for. In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the general assembly, * * * a register of deeds.

Const., Art. VII, s. 1.

2645. Vacancy filled by commissioners. When a vacancy occurs from any cause in the office of register of deeds, the board of county commissioners shall fill such vacancy by the appointment of a successor for the unexpired term, who shall qualify and give bond as required by law.

Code, s. 3649; 1868, c. 35, s. 4.
 Note. See also s. 1268.

2646. Oath of office. The register of deeds shall take the oath of office on the first Monday of December next after his election before the board of county commissioners.

Code, s. 3647; 1868, c. 35, s. 2; 1876-7, c. 276, s. 5.

2647. Where kept. The register shall keep his office at the courthouse unless the board of county commissioners shall deem it impracticable.

Code, s. 3650; 1868, c. 35, s. 5.

2648. When open. The board of county commissioners may fix by order, to be entered on their records, what days of each week, and at what hours of each day, the register of deeds shall attend at his office in person or by deputy, and he shall give his attendance accordingly.

Code, s. 3651; 1868, c. 35, s. 6.

II. DUTIES OF.

2649. Call on clerk for instruments. The register of deeds shall at least once a week apply to the clerk of the superior court of his county for all instruments of writing admitted to probate, and then remaining in the office of such clerk for registration, and also for all fees for registration due thereon: which fees the clerk of the superior court shall receive for the register.

Code, s. 3652; 1868, c. 35, s. 7.

2650. Proceed against clerk for failure to deliver papers. In case the clerk fails to deliver such instruments of writing, and pay over such fees as are prescribed in the preceding section, on application of the register, the clerk shall forfeit and pay to the register one hundred dollars for every such failure; for which sum judgment may be entered at any time by the judge of the superior court, on motion in behalf of the register, on a notice of ten days thereof to the clerk.

Code, s. 3653; 1868, c. 35, s. 8.

2651. Certify and register copies. When a deed, mortgage or other conveyance conveying real estate situate in two or more counties is presented for registration duly probated and a copy thereof is presented with the same, the register shall compare the copy with the original, and if it be a true copy thereof he shall certify the same, and thereupon the register shall endorse the original deed or conveyance as duly registered in his county, designating the book in which the same is registered and deliver the original deed to the

party entitled thereto and register the same from the certified copy thereof to be retained by him for that purpose.

1899, c. 302.

2652. To register instruments within what time. The register of deeds shall register all instruments in writing delivered to him for registration within twenty days after such delivery, except mortgages and deeds in trust, or other instruments made to secure the payment of money, which he shall register forthwith after delivery to him. He shall indorse on each deed in trust and mortgage the day on which it is presented to him for registration, and such indorsement shall be entered on his books and form a part of the registration, and he shall register such deeds in trust and mortgages in the order of time in which they are presented to him.

Code, s. 3654; R. C., c. 37, s. 23; 1868, c. 35, s. 9.

2653. Bond liable for failure to register. In case of his failure to register any deed or other instrument within the time and in the manner required by the preceding section, the register shall be liable, in an action on his official bond, to the party injured by such delay.

Code, s. 3660; 1868, c. 35, s. 10.

2654. To file papers alphabetically. The register shall keep in files alphabetically labeled all original instruments delivered to him for registration, and on application for such originals by any person entitled to their custody, he shall deliver the same.

Code, s. 3661; 1868, c. 35, s. 11.

2655. Transcribe and index books on order. The board of county commissioners, when they deem it necessary, may direct the register of deeds to transcribe and index such of the books in the register's office as from decay or other cause may require to be transcribed and indexed. They may allow him such compensation at the expense of the county for this work as they think just. The books when so transcribed and approved by the board shall be public records as the original books, and copies therefrom may be certified accordingly.

Code, s. 3662; 1868, c. 35, s. 12.

2655a. Number of survey in grants registered. The register of deeds in each county in this state, when grants have been registered without the number of the tract or survey, shall place in the registration of the grants the number of the tract or survey, when the same shall be furnished him by the grantee or other person; and in registering any grant he shall register the number of the tract or survey.

1889, c. 522, s. 2.

2656. Keep general index. The board of county commissioners, at the expense of the county, shall cause to be made and consolidated into one book, a general index of all the deeds and other documents in the register's office, and the register shall afterwards keep up such index without any additional compensation.

Code, s. 3663; 1868, c. 35, s. 13.

2657. Index instruments. The register of deeds shall provide and keep in his office full and complete alphabetical indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds and other instruments of writing required or authorized to be registered; such indexes to be kept in well-bound books, and shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed, within twenty-four hours after registering any instrument, so as to show the name of each party under the appropriate letter of the alphabet; and reference shall be made, opposite each name, to the page, title or number of the book in which is registered any instrument.

Code, s. 3664; 1899, c. 501; 1876-7, c. 93, s. 1.

Note. Failure to index misdemeanor, see Crimes, s. 3540.

2658. Clerk to board of commissioners. The register of deeds is ex officio clerk of the board of county commissioners, and as such shall perform the duties imposed by law or by order of the said board.

Code, s. 3656; 1868, c. 35, s. 15; Const., Art. VII, s. 2.

Note. For duty in regard to official reports, see s. 872.

For general duty as clerk of board, see ss. 1271, 1272, 1273.

2659. Serve certain notices by mail. The register of deeds shall serve by mail all notices issued by the board of county commissioners to justices of the peace, road overseers and school committeemen, in lieu of the service by the sheriff, and shall receive as his compensation his actual expenses for mailing, and nothing more.

Code, s. 3657; 1879, c. 328, ss. 1, 3.

2660. Make out tax lists. The register shall make out the tax lists as directed by law, under the supervision of the board of county commissioners.

Code, s. 3658; 1868, c. 35, s. 16.

2661. Omitted duties, how performed. Whenever, upon the termination for any cause of the term of office of the register of deeds, it appears that he has failed to perform any of the duties of his office, the board of commissioners shall cause the same to be performed by another person or the successor of any such defaulting

register. Such person or successor shall receive for his compensation the fees allowed for such services, and if any portion of the compensation has been paid to such defaulting register, the same may be recovered by the board of county commissioners, by suit on his official bond, for the benefit of the county or person injured thereby.

Code, s. 3655; 1868, c. 35, s. 14.

NOTE. Failure to perform duty a misdemeanor, see Crimes.

Failure to keep index misdemeanor, see Crimes.

Entry-taker ex officio, see Grants, s. 1684.

County ranger ex officio, see Strays.

For duties in regard to marriage license, see Marriage, ss. 2069, 2070, 2071.

For duty in regard to mortgage given by clerk of superior court in lieu of bond, see Bonds, s. 234.

Constables' bonds registered by, see Bonds, s. 266.

Coroners' bonds registered by, see Bonds, s. 264.

For duties in regard to elections, see Elections.

For duty to record appointments of deputy clerks, see s. 853.

For registration of report establishing dividing fences, see s. 1652.

For registration of timber trademarks, see s. 2994.

For duty as to official reports, see s. 872.

CHAPTER 65.

RELIGIOUS SOCIETIES.

(Sections 2662—2666.)

2662. May appoint trustees. The conference, synod, convention or other ecclesiastical body, representing any church or religious denomination within the state, as also the religious societies and congregations within the state, may from time to time and at any time, appoint in such manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation, who and their successors shall have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation.

Code, s. 3667; R. C., c. 97, s. 3; 1796, c. 457, s. 1; 1844, c. 47; 1848, c. 76.

2663. May remove trustees. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death

or otherwise; and the said trustees and their successors may sue and be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of any matter relating thereto. And they shall be accountable to the said churches, denominations, societies and congregations for the use and management of said property, and shall surrender it to any person authorized to demand it.

Code, s. 3668; R. C., c. 97, s. 4; 1796, c. 457, ss. 2, 3; 1844, c. 47.

2664. Title to lands to vest in trustees, or in societies. All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation within the state for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation, for which said glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which the said churches, chapels or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of the said churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in the said churches, denominations, societies and congregations, respectively, according to such intent.

Code, s. 3665; R. C., c. 97, s. 1; 1776, c. 107; 1796, c. 457, s. 4.

2665. How to convey land. The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or heretofore made, or hereafter to be made shall be effective to pass said land in fee simple to the purchaser or to the mortgagee for the purposes in such conveyances or mortgage expressed; and they may sell or mortgage its personal property.

1885, c. 384; 1889, c. 484.

2666. House on vacant land vests title. All houses and edifices erected for public religious worship on vacant lands, or on lands of the state not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept

sacred for divine worship, to and for the use of the society by which the same was originally established.

Code, s. 3666; R. C., c. 97, s. 2; 1778, c. 132, s. 6.

NOTE. For disturbing religious congregation, see Crimes.

For obstructing way to church, see Crimes.

For exhibition of stud-horse, or jack, or natural and artificial curiosities near churches, see Crimes.

CHAPTER 66.

RESTORATION TO CITIZENSHIP.

(Sections 2667—2672.)

2667. Petition for. Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, desiring to be restored to the same, shall file his petition in the superior court, setting forth his conviction and the punishment inflicted, his place or places of residence, his occupation since his conviction, the meritorious causes which, in his opinion, entitle him to be restored to his forfeited rights, and that he has not before been restored to the lost rights of citizenship.

Code, ss. 2938, 2940; R. C., c. 58, ss. 1, 3; 1840, c. 36.

2668. When and where petition for, filed. At any time after the expiration of four years from the date of conviction, the petition may be filed in the superior court of the county in which the applicant is at the time of filing and has been for five years next preceding a bona fide resident, or in the superior court of the county, at term, where the indictment was found upon which the conviction took place; and in case the petitioner may have been convicted of an infamous crime more than once, and indictments for the same may have been found in different counties, the petition shall be filed in the superior court of that county where the last indictment was found.

Code, ss. 2940, 2941; 1897, c. 110; R. C., c. 58, ss. 3, 4; 1840, c. 36.

2669. Notice given. Upon filing the petition the clerk of the court shall advertise the substance thereof, at the courthouse door of his county, for the space of three months next before the term when the petitioner proposes that the same shall be heard.

Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36.

2670. Hearing and evidence. The petition shall be heard by the judge at term, at which hearing the court shall examine all proper testimony which may be offered, either by the petitioner as to the facts set forth in his petition, or by any one who may oppose the grant of his prayer. The petitioner shall also prove by five respectable witnesses, who have been acquainted with the petitioner's character for three years next preceding the filing of his petition, that his character for truth and honesty during that time has been good; but no deposition shall be admissible for this purpose unless the petitioner has resided out of this state for three years next preceding the filing of the petition.

Code, ss. 2938, 2939; 1897, c. 110; 1901, c. 533; R. C., c. 58, ss. 1, 2; 1840, c. 36.

2671. Decree. At the hearing the court, on being satisfied of the truth of the facts set forth in the petition, and on its being proved that the character of applicant for truth and honesty is good, shall decree his restoration to the lost rights of citizenship, and the petitioner shall accordingly be restored thereto.

Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36.

2672. Pardon, procedure after. Any person convicted of any crime, whereby the rights of citizenship are forfeited, and the judgment of the court pronounced does not include imprisonment anywhere, and pardon has been granted by the governor, such person may be restored to such forfeited rights of citizenship upon application, by petition, to the judge presiding at any term of the superior court held for the county in which the conviction was had, one year after such conviction. The petition shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and that pardon has been granted by the governor, and also that said crime was committed without felonious intent, and shall be verified by the oath of the applicant and accompanied by the affidavits of ten reputable citizens of the county, who shall state that they are well acquainted with the applicant and that in their opinion the crime was committed without felonious intent. No notice of the petition in such case shall be necessary, and no advertisement thereof be made, but the same shall be heard by the judge, upon its presentation, during a term of court; and if he is satisfied as to the truth of the matters set out in the petition and affidavits, he shall decree the applicant's restoration to the lost rights of citizenship, and the clerk shall spread the decree upon his minute docket.

1899, cc. 44, 249.

CHAPTER 67.

RIVERS AND CREEKS.

(Sections 2673—2684.)

2673. County commissioners to appoint commissioners.

Where any inland river or stream shall run through the county, or be a line of their county, the boards of commissioners of the several counties may appoint commissioners to view such river or stream, and make out a scale of the expense of labor with which the opening and clearing thereof will be attended; and if the same shall be deemed within the ability of the county, and be expedient, they may appoint and authorize the commissioners to proceed in the most expeditious manner, in opening and clearing the same, by taking such hands from the public roads as the board of county commissioners shall permit and direct to be allotted to such work; which hands shall be placed under overseers in companies, every overseer and company to have a distinct portion of such river or stream to be laid off by the board of commissioners.

Code, s. 3706; 1887, c. 370.

2674. Overseers appointed annually; duty. Every overseer shall be appointed by the board of county commissioners; and the clerk shall issue a notice, expressing therein the name of the stream, the distance he is to work thereon, and the hands appointed under him, and the sheriff shall serve the same upon him, under the same rules as notices are served upon overseers of roads; and the overseer and hands, upon receiving three days' previous notice from the commissioners, shall proceed to work upon and clear out such river or stream, subject to the same rules and double the penalties imposed upon overseers and hands working upon public roads; and no overseer or hands appointed to open and clear out navigable rivers and streams shall be compelled to work on public roads. And the board of county commissioners thereafter shall annually appoint overseers, and assign such hands as they may judge proper, to work on rivers and creeks, and keep in repair any slopes erected or to be erected; and such overseers, and the hands assigned, for a failure of duty shall be subject to all the penalties imposed upon overseers of roads and the hands liable to work thereon.

Code, s. 3707; R. C., c. 100, s. 2; 1784, c. 227, s. 16; 1796, c. 460, s. 2; 1809, c. 782, s. 3; 1812, c. 845, ss. 1, 2, 3; 1813, c. 859, ss. 1, 2; 1844, c. 66.

2675. Flats and appurtenances procured. The board of county commissioners appointing the commissioners may direct them to purchase or hire a flat with a windlass and the appurtenances necessary to remove loose rock and other things, which may by such means be more easily removed, and allow the same to be paid for out of the county funds.

Code, s. 3708; R. C., c. 100, s. 3; 1785, c. 242, s. 2.

2676. Neuse river in certain counties. The boards of commissioners of the counties of Johnston, Wayne, Lenoir and Craven, at the first meeting which shall be held for their respective counties after the first day of July, may yearly appoint and lay off, in convenient districts, all the inhabitants of their counties, respectively, resident above Spring Garden on both sides of Neuse river, within such distances of the river as the said boards of county commissioners shall appoint; and for each district appoint some person as overseer, who shall cause all persons, within the district allotted to him, liable to work on public roads, to work at least six days in every year on the river, unless the boards of county commissioners shall otherwise direct; during which time he shall cause them to be employed in removing all logs, brush and other obstructions to navigation; and for neglect he shall be guilty of a misdemeanor; and every person liable to work as aforesaid, or send hands, who shall fail when warned (as hands are for working on roads) to appear and work, with such tools as the overseer shall direct, shall pay for each day one dollar, to be recovered and applied in the same manner as fines for failing to work on public roads: Provided, that nothing in this section shall abridge, or interfere with, the rights and privileges of the Neuse River Navigation Company.

Code, s. 3709; R. C., c. 100, s. 4; 1823, c. 1197.

2677. Laid off in districts; passage for fish. The board of county commissioners may appoint commissioners to examine and lay off the rivers and creeks in their county; and where the stream is a boundary between two counties, may lay off the same on their side; in doing so they shall allow three-fourths for the owner of the streams for erecting slopes, dams and stands; and one-fourth part, including the deepest part, they shall leave open for the passage of fish, marking and designating the same in the best manner they can; and if mills are built across such stream, and slopes may be necessary, the commissioners shall lay off such slopes, and determine the length of time they shall be kept open; and such commissioners shall return to their respective boards of county commissioners a plan of such slopes, dams and other parts of streams viewed and surveyed.

Code, s. 3710; R. C., c. 100, s. 5; 1787, c. 272, s. 1.

2678. Commissioners to examine streams. The commissioners appointed by the board of county commissioners to examine and lay off the rivers and creeks within the county, or where the stream is a boundary between counties, shall have power to lay off gates, with slopes attached thereto, upon any milldam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber, in cases where it may be deemed necessary by the said board of county commissioners; and they shall return to the board of county commissioners appointing them a plan of such gates, slopes and dams in writing.

Code, s. 3712; 1858-9, c. 26, s. 1.

2679. Report made and confirmed. Upon the confirmation of the report made by the commissioners, and notice thereof given to the owner or keeper of said mill, it shall be his duty forthwith to construct, and thereafter to keep and maintain, at his expense, such gate and slope, for the use of persons floating logs and other timber as aforesaid, so long as said dam shall be kept up, or until otherwise ordered by the board of county commissioners.

Code, s. 3713; 1858-9, c. 26, s. 2.

2680. Gates and dams discontinued. The commissioners at any time thereafter, appointed as aforesaid, when they may deem such gate and slope no longer necessary, may report the fact to their respective boards of county commissioners, and said boards of county commissioners may order the same to be discontinued.

Code, s. 3714; 1858-9, c. 26, s. 3.

Note. Owner of dam failing to make gates guilty of misdemeanor, see Crimes.

2681. Repairing breaks. Wherever any stream of water which is used to propel machinery shall be by freshet or otherwise diverted from its usual channel so as to impair its power as used by any person, such person shall have power to repair the banks of such stream at the place where the break occurs, so as to cause the stream to return to its former channel.

Code, s. 3716; 1879, c. 53, s. 1.

2682. Entry upon lands of another to make repairs. In case the break occurs on the lands of a different person from the one utilizing the stream, the person utilizing the stream shall have power to enter upon the lands of such other person to repair the same, and in case such person objects, the clerk of the superior court of the county in which the break occurs shall, upon application of the party utilizing the stream, appoint three disinterested freeholders, neither of whom shall be related to either party, who after being duly sworn shall lay off a road if necessary by which said

person may pass over the lands of such other person to the break and repair said break from time to time as often as may be necessary, so as to cause the said stream to return to its original channel, and assess any damage which may thereby be occasioned: Provided, the party upon whose land the work is proposed to be done shall have five days' notice in writing served on him or left at his place of residence: Provided further, that it shall be the duty of said commissioners to assess the damages of any one on whose land the road shall be laid off to be paid by the applicant for said road: Provided also, that either party shall have the right of appeal to the superior court.

Code, s. 3717; 1879, c. 53, s. 2.

Note. Misdemeanor to prevent person passing over lands, see Crimes.
For penalty for obstructing streams, see Crimes.

2683. Draws in bridges. Whenever the navigation of any river or creek, which, in the strict construction of law, might not be considered a navigable stream, shall be obstructed by any bridge across said stream, it shall be lawful for any person owning any boat plying on said stream to make a draw in such bridge sufficient for the passage of such boat; and the party owning such boat shall construct and maintain such draw at his own expense, and shall use the same in such manner as to delay travel as little as possible.

Code, s. 3719; 1879, c. 279, ss. 1, 2.

2684. Public landings. The board of county commissioners may establish public landings on any navigable stream or watercourse in the same manner that public roads are laid out and established. The board of county commissioners, on any petition for a public landing, shall order how the costs shall be paid. All places heretofore established as public landings shall remain such.

Code, s. 2982.

NOTE. Misdemeanor to obstruct streams by felling trees, see Crimes.

CHAPTER 68.

ROADS, BRIDGES, FERRIES.

| | Sections. |
|-------------------------------|------------|
| I. Described, | 2685—2686 |
| II. Established, | 2687—2695 |
| III. Changed or discontinued, | 2696—2698 |
| IV. Bridges, | 2699—2707b |
| V. Toll bridges, | 2708—2712 |
| VI. Gates across, | 2713 |
| VII. Supervisors, | 2714—2716 |
| VIII. Overseers, | 2717—2726 |
| IX. Who to work, | 2727—2728 |
| X. General provisions, | 2731—2732 |

I. DESCRIBED.

2685. What constitutes; board of supervisors. All roads and ferries that have been laid out or appointed by virtue of any act of assembly, or any order of court, are hereby declared to be public roads and ferries; and the justices of the peace in each township shall have the supervision and control of the public roads in their respective townships. They shall, with respect to this work, constitute and be styled the board of supervisors of public roads of such township, and under that name, for the purposes aforesaid, they are hereby incorporated the board of supervisors of public roads, and the board of county commissioners, as hereafter in this chapter set forth, shall have full power and authority within their respective counties to appoint and settle ferries, to order the laying out of public roads where necessary, to appoint where bridges shall be made, to discontinue such roads and ferries as shall be found useless, and to alter roads so as to make them more useful.

Code, s. 2014; 1887, c. 73; 1889, c. 543; 1893, c. 141; R. C., c. 101, s. 1; 1784, c. 227, s. 1; 1868, c. 20, ss. 11, 16, 17, 18; 1868-9, c. 185, s. 14; 1879, c. 82, s. 1.

2686. Width. All roads, except such as are causewayed or through cuts, shall be not less than eighteen feet wide, clear of trees, logs and other obstructions to the passage of ordinary vehicles, and there shall be ten feet in width in the centre of the roadway clear of stumps and runners. Where, by the overseers, it may be deemed expedient to make or repair causeways on the same, they shall be at least fourteen feet wide; and earth, necessary to raise or cover them, shall be taken from either hand, so as to form a drain on each side of the causeway; and they shall make, of the same width, necessary bridges through swamps and over small streams

of water: Provided, this section shall not apply to the roads in those counties where there is by law a classification of the widths of the roads.

Code, s. 2025; R. C., c. 101, s. 14; 1784, c. 227, s. 2; 1880, c. 30, s. 6.

II. ESTABLISHED.

2687. By whom; jurors; appeal. The board of supervisors shall have the right to lay out and discontinue cartways, and the board of commissioners of the county only shall have the right to lay out and establish and discontinue public roads: Provided, that in laying out and establishing roads and cartways, and for the purpose of assessing damage to property by reason of the same, no greater number of jurors than five shall be summoned or be required: Provided further, that either party may appeal from the decision of the board of supervisors to the board of commissioners of the county.

Code, s. 2023; 1879, c. 82, s. 9.

2688. Petition; notice given. The board of county commissioners shall not establish any ferry, or order the laying out of any public road, or discontinue or alter such road or ferry, unless upon petition in writing. And unless it appear to the board that every person, over whose lands the said road may pass, or whose ferry shall be within two miles of the place at which another ferry is prayed to be established, shall have had twenty days' notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof be posted during the same period at the courthouse door; at which meeting the board shall hear the allegations set forth in the petition, and if sufficient reason be shown, the board shall appoint and settle or discontinue the said ferry, or order the laying out, or discontinue or alter the said road, as the case may be.

Code, s. 2038; R. C., c. 101, s. 2; 1813, c. 862, s. 1.

2689. How laid out. All public roads shall be laid out by a jury of five freeholders, who shall be summoned by the sheriff to meet at one of the termini of the proposed road, and, being duly sworn by the sheriff or other person authorized to administer oaths, shall lay out said road to the greatest advantage of the inhabitants, and with as little prejudice as may be to lands and enclosures; which laying out and such damage as private persons may sustain, shall be done and ascertained, by the same jury on oath; and all damages by them assessed shall be deemed a county charge.

Code, s. 2040; 1885, c. 65; R. C., c. 101, s. 4; 1872-3, s. 3; 1879, c. 82, s. 9.

2690. Cartways, tramways, established. If any person be settled upon or cultivating any land, or shall own any standing timber to which there is leading no public road, or which is not convenient to water, and it shall appear necessary, reasonable and just that such person should have a private way to a public road or watercourse or railroad over the lands of other persons, he may file his petition before the board of supervisors of the township praying for a cartway, tram or railway to be kept open across such other persons' lands, leading to some public road, ferry, bridge, public landing or watercourse or railroad; and upon his making it appear to the board that the adverse party has had ten days' notice of his intention, the board shall hear the allegations of the petitioner and the objections of the adverse party or parties, and if sufficient reason be shown, shall order the constable to summon a jury of five freeholders, to view the premises, and lay off a cartway, tram or railway, not less than fourteen feet wide, and assess the damages the owner of such land may sustain thereby; which, with the expense of making the way, shall be paid by the petitioner; and the cartways established under this section shall be kept open for the free passage of all persons on foot or horseback, and all carts and wagons: Provided, that if the notice aforesaid shall not have been given, the board shall cause such petition to be filed with their chairman until their next meeting, when they shall proceed to hear and determine the same, and the petitioner or the adverse party may appeal from the order of the supervisors to the board of commissioners of the county, and from the order of the board of commissioners to the superior court at term, when the issues of fact shall be tried by a jury, and from the judgment of the superior court to the supreme court, as in other cases of appeal.

Code, s. 2056; 1903, c. 102; 1887, c. 46; R. C., c. 101, s. 37; 1798, c. 508, s. 1; 1822, c. 1139, s. 1; 1879, c. 258.

2691. Church roads established. The board of supervisors in each township is authorized to order the laying out of any and all necessary roads to and from any church or other place of public worship in their said townships, to discontinue such roads when they may be found useless, and to alter the same so as to make them more useful, and the right of way herein provided for shall terminate whenever the church or place of worship shall cease to be used as such.

Code, s. 2062; 1872-3, c. 189, ss. 1, 5.

2692. Petition for church road; procedure. The said board of supervisors shall not order the laying out of any such road or discontinue or alter the same except upon petition, in writing, nor shall they hear any such petition, unless it may be made to appear that

every person over whose lands the said road may pass shall have had ten days' notice of the intention to file such petition, by personal service of notice in writing, or if the owner be unknown or there be no owner, agent or attorney of such owner resident in this state, then by notice thereof posted up at the courthouse door of the county in which the township is situate and at two public places in the township for the space of ten days; and upon the hearing of the petition, if sufficient reason be shown, the said board of supervisors shall order the laying out, discontinue or alter the said road as the case may be, and from their determination any party dissatisfied may appeal as is provided in this chapter in the section directing the laying off of cartways.

Code, s. 2063; 1872-3, c. 189, s. 2.

2693. Manner of laying out. All roads provided for in the two preceding sections shall be laid out to the greatest advantage of the inhabitants and with as little prejudice as may be to lands and enclosures, within twenty days from the notification of their appointment by five disinterested freeholders, to be appointed by the said board of supervisors; and such damage as any individuals may sustain shall be ascertained by the said freeholders, and a report thereof with the proceedings had by them shall be made to the said board of supervisors; and all damages so assessed by the freeholders shall be paid by the petitioners, and until paid there shall be no confirmation of the report of the freeholders, and such laying out shall be of no effect.

Code, s. 2064; 1872-3, c. 189, s. 3.

2694. Appeal; bond; trial de novo. Any person may appeal to the superior court at term time from the determination of the board of county commissioners, and if any person shall appeal from the board on a petition, he shall give bond to the opposing party as provided in other cases of appeal, and the superior court at term shall hear the whole matter anew; and where any proceeding is instituted to lay out, establish, alter or discontinue public roads or to appoint and settle ferries, and the said proceeding is carried to the superior court in term time by appeal or otherwise, the parties to said proceeding shall be entitled to have every issue of fact joined in said proceeding tried in the superior court in term time by jury, and from the judgment of the superior court either party may appeal to the supreme court as is provided by law for other appeals.

Code, s. 2039; R. C., c. 101, s. 3; 1813, c. 862, s. 1; 1879, c. 258.

2695. Public ferry sites condemned. Wherever a public ferry has been or may hereafter be established, the board of county commissioners of the county in which any such ferry is or may be

located shall have power to condemn land, not exceeding one acre for each public ferry, adjacent or convenient to said ferry, upon which to erect necessary buildings for the use and convenience of ferry-men and the traveling public, under the same rules and regulations as are provided by law for condemning land for public roads; and upon the payment or offer of payment, to the owner of said land, of the amount awarded to him therefor, title to the same shall vest in the county in which said land is situate. Nothing in this section shall be construed to deprive the owner of land so condemned of the right of appeal to the superior court.

1889, c. 447.

III. CHANGED OR DISCONTINUED.

2696. On petition. Whenever, upon petition of any person, a road shall be changed and, as a condition thereof, it shall be required by the board that he put the proposed road in good condition, he may, at any time thereafter, tender the same to the overseer, who shall receive it, if it be in such condition as is required for highways; and if not, he shall reject it; and in either case he shall report and certify the fact to said board where the same may be considered; and said board shall hear all persons interested in the matter of receiving or rejecting the road; and the decision of the board shall be conclusive as to the condition of the road; but the old road shall not be closed until it be discontinued by order of the board.

Code, s. 2041; R. C., c. 101, s. 5; 1784, c. 227, s. 13; 1813, c. 862, s. 1.

2697. By land owner. In addition to the mode prescribed in the preceding section for turning roads, the following method may be observed by any one who desires to change a road from one part of his land to another part, namely: Such person shall lay out the same, and after putting it in such good condition as highways are directed to be, shall apply to a justice of the peace, who thereupon shall notify the overseer of the road, and summon two freeholders to meet on the premises at a given day; and the said freeholders, being duly sworn, shall, with the justice, view and examine carefully the road which is proposed in place of the other, and all matters and facts tending to show whether the change should be allowed. They shall report, in writing subscribed by them, the result of their consideration to the next meeting of the board of supervisors, which may confirm or reject their report: Provided, that such justice and freeholders shall be disinterested in the land, and not of kin or affinity to the applicant.

Code, s. 2042; R. C., c. 101, s. 6; 1834, c. 22.

2698. Cartways, tramways, railways; gates. Cartways, tramways or railways laid off according to the provisions of this chapter, may be changed or discontinued upon application by any person concerned, under the same rules of proceeding as they may be first laid off, and upon such terms as to the board of supervisors shall seem equitable and just. Cartways, tramways or railways for the removal of timber, shall continue for a period not longer than five years, and in entering cultivated land, shall protect the same by sufficient stock-guards. And any person through whose land a cartway may pass may erect gates across the same, which shall be kept in good repair; and if any person shall leave open, break down, or otherwise injure such gates or bars, he shall forfeit and pay, for every such offense, ten dollars to the person erecting the same or his assigns of the land; and if the offense shall be maliciously done, he shall be guilty of a misdemeanor.

Code, s. 2057; 1887, c. 46, s. 2; R. C., c. 101, s. 38; 1798, c. 508, ss. 1, 2, 3; 1834, c. 16, s. 1; 1887 c. 266.

IV. BRIDGES.

2699. Where footways and hollow bridges maintained. Every overseer of the road, when the township board of supervisors may so direct, shall cause to be made and kept in repair, for the convenience of travelers on foot, good and sufficient footways over all swamps and streams of water that may cross that part of the road allotted to him; and, when the board shall so direct, shall also erect and keep hand-rails on each side of all hollow bridges situate on such part of the road: Provided, that at all places where footways and hand-rails, at hollow bridges or over swamps and streams of water, shall have been commonly used, for the space of ten years next preceding any period within three years before presentment made or indictment found for want of such footways or hand-rails, the same shall be conclusive evidence of an order theretofore made by the board, that they shall be erected and kept up, subject to be rebutted only by producing an order dispensing with them made within three years next before such presentment.

Code, s. 2029; R. C., c. 101, s. 17; 1817, c. 940, ss. 1, 2.

2700. How made and maintained; when connecting two counties; liability of county commissioners. When a bridge shall be necessary, and the overseer with his assistants can not conveniently make it, the board of county commissioners shall contract for the building, keeping and repairing thereof, provided the cost of the same does not exceed five hundred dollars, and the same shall be a charge on the county; and when bridges shall be necessary over any stream which divides one county from another,

the commissioners of each shall join in agreement for building, keeping and repairing the same, provided the cost of the same does not exceed five hundred dollars; and the charge thereof shall be defrayed by both counties, in proportion to the number of taxable polls in each, and bridges shall be deemed necessary, as provided for in this section, in all cases where public roads have been regularly laid off in each county according to law to the banks of any stream which divides one county from another, if there be no ford across said stream, so long as said road shall continue to be a public ferry road; and if the commissioners of each county shall not provide their proportionate part of the money necessary for keeping up and repairing the bridges across such stream, then each of said commissioners shall be liable to a penalty of fifty dollars, to be sued for by any taxpayer of the county, one-half of said penalty to go to the party suing for the same and the other half to the school fund of the county.

Code, s. 2034; 1887, c. 370; 1889, c. 317; R. C., c. 101, s. 22; 1784, c. 227, s. 6.

2701. Person constructing ditch across public road to maintain. It shall be the duty of every owner of a water-mill, which is situate on any public road, and also of every person who, for the purpose of draining his lands, or for any other purpose, shall construct any ditch, drain or canal across a public road, respectively, to keep at his own expense in good and sufficient repair, all bridges that are or may be erected or attached to his milldam, immediately over which a public road may run; and also to erect and keep in repair all necessary bridges over such ditch, drain or canal on the highway, so long as they may be needed by reason of the continuance of said mill, or milldam, ditch, drain or canal. Nothing herein shall be construed to extend to any mill which was erected before the laying off of such road, unless the road was laid off by the request of the owner of the mill. The duty hereby imposed on the owner of the mill, and on the person cutting the drain or canal, shall continue on all subsequent owners of the mill, or other property, for the benefit of which the said ditch, drain or canal was cut. When any ditch or drain originally constructed across any public road, and bridged for the convenience and safety of the traveling public, has been or may hereafter be enlarged by the owner of adjacent lands to drain his lands, it shall be the duty of such owner to keep up and in repair all bridges crossing such ditch, drain or canal, and such charge shall be imposed upon all subsequent owners of the lands so drained. Any person throwing a bank of dirt in the main road shall be compelled to spread the same. When any ditch or drain is cut in such way as to turn water into any public road the person cutting such ditch or drain shall be compelled to cut such

other ditch or drain as may be necessary to take the water from said road.

Code, s. 2036; 1887, c. 261; R. C., c. 101, s. 24; 1817, c. 941. s. 1; 1846, c. 95, s. 1; 1881, c. 290.

2702. When county to erect draws. The county or counties which may erect bridges shall, by their boards of commissioners, provide and keep up draws in all such bridges, where the same may be necessary to allow the convenient passage of vessels. When any such draw shall be necessary to be erected for the passage of timber-rafts, said draw may not exceed twenty feet in width.

Code, s. 2053; 1891, c. 168; R. C., c. 101, s. 34.

2703. When owner of, to put in draw. Owners of steamboats or other craft, who may intend to navigate any river or creek over which any person may have a bridge, may give three months' notice thereof in one of the public journals of the state, published nearest the river or creek intended to be navigated, and to the owner of said bridge, to construct a draw of sufficient width to allow the passage of the boat which is to be used; and if the owner of said bridge shall not, within three months from the date of the notice, construct the required draw, he shall forfeit and pay the person so notifying, if he be thereby prevented from navigating the water-course, fifty dollars; and shall be further subject to the like penalty, under like circumstances, for every three months' default thereafter.

Code, s. 2052; R. C., c. 101, s. 32; 1846, c. 51, ss. 1, 2; 1838-9, c. 5.

2704. Railroads keep up, when. Railroad, plankroad and turnpike companies, each, shall keep up, at their own expense, all bridges on or over county, or incorporated roads, which they have severally made it necessary to be built, in establishing their respective roads; and on failure to do so, shall forfeit and pay twenty-five dollars to any person who may sue for the same.

Code, s. 2054; R. C., c. 101, s. 35.

Note. See also, s. 2566 et seq.

2705. Railroads keep up draws, when. Railroad, plankroad and turnpike companies, erecting bridges across watercourses, shall attach and keep up good and sufficient draws, by which vessels may be allowed conveniently to pass.

Code, s. 2051; R. C., c. 101, s. 32; 1846, c. 51, ss. 1, 2.

2706. County orders for, valid. Every contract and order by the board of county commissioners entered into or made as authorized by this chapter for or concerning the building, keeping up or

repairing bridges, in such manner as to them may seem most proper, shall be valid against the county.

Code, s. 2035; 1887, c. 370, s. 2; R. C., c. 101, s. 23; 1784, c. 227, s. 6.

2707. Penalty for neglect to repair. Every person who shall fail to perform the duties imposed upon him by this chapter, or shall leave out of repair any such bridge, for the space of ten days, unless prevented by unavoidable circumstances, shall be liable for such damages as may be sustained.

Code, s. 2037; R. C., c. 101, s. 25; 1817, c. 941, s. 2; 1876-7, c. 90; 1876-7, c. 211.

2707a. How expense of maintaining borne. The expense of building and keeping up public bridges in the several counties shall be borne by the whole people of each, and not by the people of the township separately, in which such bridges may be situated; and it shall be the duty of the commissioners to adjust this burden equally among the people of their respective counties, and they shall exercise a due supervision over the action of the respective boards of supervisors of the townships, so as to prevent the board of any township from establishing any unnecessary number of bridges in their respective townships.

Code, s. 2060; 1869-70, c. 219.

2707b. Solicitor to prosecute for injury to bridges. The solicitors of the superior court are authorized and directed to institute suits in the name of the state, in the counties wherein the injuries may be done, for the recovery of damages, against all persons who shall wilfully or negligently injure any public bridge belonging to or situate in any county or counties, by forcibly running any decked vessel, boat or raft against the same; by cutting trees or timber in the rivers or creeks above such bridges, or by any other manner or means whatsoever. In case the injury is done to two counties, the action may be brought in either for the entire damage; and the damages which may be recovered shall be for the use of the county or counties injured; and if the plaintiff fail, the costs shall be paid by the county or counties for whose use the suit is brought, and in the same proportion in which the recovery would be divided.

Code, s. 2055; R. C., c. 101, s. 36; 1846, c. 11, ss. 1, 2.

V. TOLL BRIDGES.

2708. When commissioners may establish. Whenever, from the rapidity or width of any stream, it may be too burdensome to build and keep up a bridge across the same, at the expense of those who are taxable for that purpose, the board of commissioners of

the county, or counties, chargeable therewith, may jointly and severally (as the case may be) contract for the building thereof, by allowing the builder to take tolls, at such rate and for such time, on all persons, horses, carriages and other things passing over the bridge, as may be agreed on between the board of commissioners and the builder; which tolls shall be common to all persons. And such bridges shall be built in the manner the board or boards may direct, and shall be kept in good repair by the builder, his heirs and assigns, during the time the tolls are to be enjoyed.

Code, s. 2045; R. C., c. 101, s. 26; 1784, c. 227, s. 7; 1817, c. 939, s. 2; 1817, c. 940, s. 3.

2709. Commissioners may regulate tolls. The board of commissioners of each county shall, once a year, or oftener if necessary, at the meeting to be held next after the first day of January, rate the prices of such ferries as shall be kept within their respective counties; and any ferry keeper who shall ask, demand, or receive a greater price for ferriage than shall be rated by the board of commissioners, shall forfeit and pay five dollars for every offense to the party aggrieved. And every person who owns a public ferry, and refuses to keep it up at the rates allowed by the board, shall for every such offense forfeit five dollars.

Code, s. 2046; R. C., c. 101, s. 27; 1779, c. 160, s. 2.

2710. Owner of ferry may build. In all cases, where the proprietor of a ferry shall prefer building a good and substantial bridge over any watercourse instead of keeping a ferry, he may do so; and may claim and hold such bridge under the same rights, and in the same manner, by which the ferry is claimed and held, and under the same rules, regulations, restrictions and penalties as other toll-bridges: Provided, that no more toll shall be demanded for passing any such bridge than is granted by law for the ferriage, unless by agreement with the board of commissioners: Provided further, that in all such bridges the proprietor shall erect a draw, where the free navigation of the stream may require it.

Code, s. 2047; R. C., c. 101, s. 28; 1806, c. 706.

2711. Owner of, and ferries to give bond. The board of commissioners of each county shall compel every person that may own a toll-bridge, or keep a public ferry, within the county, to give bond with good surety in the sum of one thousand dollars, payable to the state of North Carolina, conditioned that he will constantly keep such bridge in good repair, or, as the case may be, provide and keep good and sufficient boats, or other proper craft, always to be well attended, for the passing of travelers or other persons, their horses, carriages and effects; and will indemnify and save harmless

every person who may be endamaged, by reason of any default in his undertaking. And if any person shall receive damage, because such ferryman or keeper of a toll-bridge shall not have complied with the conditions of his bond, he may bring suit thereon in the name of the state, and recover his damages. And if any person shall be detained at any public ferry by reason of the ferryman not having sufficient boats or other proper crafts and hands, or by his neglecting to do his duty in any other respect, he may recover before a justice of the peace, against such ferryman, the sum of ten dollars, as a penalty for every such default or neglect.

Code, s. 2048; R. C., c. 101, s. 29; 1784, c. 227, s. 15.

2712. Penalty on unauthorized ferry. If any unauthorized person shall pretend to keep a ferry or to transport for pay any person or his effects, within five miles of any ferry on the same river or water, which theretofore may have been appointed, he shall forfeit and pay two dollars for every such offense, to the nearest ferryman: Provided, that any person who may contract for carrying the mail, may keep a boat for the sole purpose of transporting the same, and such passengers as may travel in the coach therewith, across any ferry; but such contractor shall not transport across such ferry any other passengers than such as travel by the coach.

Code, s. 2049; R. C., c. 101, s. 30; 1764, c. 72, s. 1; 1787, c. 273; 1883, c. 381.

VI. GATES ACROSS.

2713. Permission for erection. Any person desiring to erect a gate across a public road may file his petition before the board of supervisors of the township where the road lies; whereupon publication shall be made at the courthouse until the next succeeding meeting, of such application, specifying the road, the place for the gate and name of the petitioner; and all persons interested in the convenient traveling or transportation on said road shall have leave to appear and defend, demur, or plead to said petition; and if, at that meeting, it shall appear that such publication has been made, the supervisors may, at their discretion, authorize the petitioner, at his cost, to erect a gate as prayed for.

Code, s. 2058; R. C., c. 101, s. 39; 1834, c. 16, ss. 2, 3, 4.

Note. See s. 2687.

VII. SUPERVISORS.

2714. To meet, when and where. The board of supervisors shall meet at some place in their respective townships to be agreed upon by themselves, or in the absence of such agreement, to be named by their chairman, on the first Saturday of February and August, for the purpose of consulting on the subject of the condi-

tion of the roads in their township. They shall once in each year, during the week of their meeting in August, go over and personally examine all the roads in their township. They shall annually at their meeting in February elect some one of their number chairman: Provided, that no supervisor shall receive any compensation for his services as supervisor of public roads.

Code, s. 2015; 1879, c. 82, s. 2; 1880, c. 30, s. 1.

2715. To make annual reports to superior court. The board of supervisors shall annually make report to the first term of the superior court of their county after the first Monday in August of the condition of the roads of their township, and if the meetings provided for in this chapter have been held by said board, the judge holding such term of the superior court shall, after his charge to the grand jury and before they shall retire to their room, call upon the clerk of the court for such reports, and they shall then and there be delivered to the foreman of the grand jury.

Code, s. 2024; 1879, c. 82, s. 10.

2716. To have orders appointing overseers served within thirty days; penalties. The board of supervisors of the township, within ten days after the rise of the board, shall furnish the constable with two copies of each order appointing overseers of roads that may have been made during the sitting of the board. And the constable shall apply at the office of the board, within ten days after the rise of every meeting of the board, for such orders, and, on receiving them, shall, within twenty days, serve each overseer of roads with a copy of the order, or leave the same at his usual habitation; and the other copy shall be returned to the next meeting of the board of supervisors, with the date of its reception by him and the date of the service indorsed thereon, or the date when it was left at the residence of the said overseer. And if either the board or constable shall fail to perform any duty enjoined by this section, he shall forfeit ten dollars to the county, to be recovered at any time, by notice to show cause at the instance of the solicitor, who shall prosecute the same in the name of the state: Provided, the delivery to the overseer of the order appointing him made by the board of supervisors of the township, or any one of them, shall be deemed and held to be a legal service of the same.

Code, s. 2043; 1891, c. 519; R. C., c. 101, s. 8; 1812, c. 845, ss. 1, 2; 1813, c. 859, ss. 1, 2.

VIII. OVERSEERS.

2717. When appointed; when hands allotted. The board of supervisors shall, annually at the meeting in August, divide the roads of their townships into sections and appoint overseers for such sections at said meeting. They shall at the same time allot the

hands to the overseers, and shall also designate the boundaries or points to which each resident shall be liable to work on each section, and shall within five days after such meeting certify to each overseer written notice of his appointment, with a list of the hands assigned to his section. The board of supervisors may at any time alter the sections or allotment, but shall give notice thereof to the overseer. Such overseer shall serve, and be liable as such for neglect of duty, until he shall be relieved by the board, which shall be done only upon his showing that his road is in good condition as prescribed by law. The overseer may resign after the expiration of twelve months, provided his road shall be in good repair and the board of supervisors shall so find; and any overseer so resigning, and whose resignation has been accepted by the board, shall not without his consent be again appointed overseer until after the expiration of two years from the date of his resignation. When a public road shall be a dividing line between townships, the board of commissioners of the county shall determine as to how said road shall be divided, with notice as to the working of said road. The hands may be allotted to a road by allotting all who live or shall live within certain boundaries to be fixed by the board of supervisors, in which event a list of the hands by name need not be given, but the list shall specify the hands living in the prescribed territory.

Code, s. 2016; 1879, c. 82, ss. 3, 7; 1880, c. 30, s. 1; 1887, c. 93, s. 1.

2718. Reports to supervisors. Every overseer shall at each and every meeting of the board of supervisors of his township make report to them of the present condition of his road, of the number of days worked on his section since last meeting, of the number of hands who attended and worked each day, of the number and names of hands who failed to attend and work: whether or not they were legally summoned, and whether or not they paid the one dollar as provided. The said overseer shall, before some person authorized to administer an oath, make written affidavit that the report is true and correct. Upon this report sworn to as aforesaid, if it shall appear that any of the hands, after being legally summoned, have failed to attend and work on said road, and that they did not pay the one dollar, then it shall be the duty of the said supervisors, or any one of them, to issue a warrant for the arrest of any such hand, and shall put him upon trial for the offense: Provided, that nothing herein contained shall prevent the overseer of the road from prosecuting, at any time after the offense has been committed, any hand for failure to work on the road, and such cases of prosecution shall be stated in his report to the board of supervisors, that they may not prefer another prosecution for the same offense.

Code, s. 2021; 1879, c. 82, s. 7; 1880, c. 30, s. 4.

2719. To report money collected and how expended. The said overseers shall, at the meeting of the supervisors in August, make a report of all moneys collected by them from parties excused from work on the road for the preceding year, with a statement as to how the same was expended. In case of failure of any overseer to make any report to the board of supervisors of public roads of his township, as provided in this chapter, it shall be the duty of the chairman of such board immediately upon such failure to make a sworn statement of the fact before some justice of the peace of an adjoining township, who shall immediately issue his warrant for the arrest of the said overseer, and proceed to try him for the offense.

Code, s. 2022; 1879, c. 82, s. 8.

2720. May lay off tasks to hands. The overseer, if requested by a majority of the hands on the road assigned him, may, in his discretion, lay off the road in equal portions for the convenience of the laborers, who shall finish his or their part in a time agreed on between him and each person, and on default of any agreeing party, the overseer shall cause such part to be finished by the labor of other persons, and by warrant may recover the value thereof to his own use: Provided, that the time agreed on shall not exceed six days, and that nothing in this section shall be a defense to the overseer, when prosecuted for default concerning the condition of the road.

Code, s. 2026; R. C., c. 101, s. 13; 1784, c. 227, s. 10.

2721. May use timber and dirt on roads. Overseers may lawfully cut poles and other necessary timber, for repairing and making bridges and causeways. And whenever earth shall be needed on a public road, and it can not be conveniently procured on either side of the causeway, the overseer may lawfully take the earth from any adjoining land.

Code, s. 2027; R. C., c. 101, s. 18; 1785, c. 256, s. 1; 1818, c. 976, s. 1.

2722. Notice to work on road, how served. When an overseer shall not be able to personally notify the hands three days before the day appointed for working the road, he shall leave at the house of each hand a written summons, specifying the day on which they are required to attend, the place of the road to be worked, and the kind of tools to be brought or used; and the said written summons, left as aforesaid, shall be deemed sufficient notice to the hands required to be notified; and all penalties recovered by an overseer, for default of working on the road, shall be applied by him to the repair of the road of which he is, or may have been overseer.

Code, s. 2044; R. C., c. 101, s. 10; 1842, c. 65.

2723. When roads to be worked. The overseer of the road shall, as often as the road shall require, not more than six days in any one year, summon the hands of his section to work on the road, but the said hands shall not be required to work continuously for a longer time at any one time than two days, and at least fifteen days shall intervene between workings, except in case of special damage to the road, resulting from a storm. The notice shall be at least three days before the day named for the work, and shall state the hour and the place for the meeting of the hands, and what implement the hand shall bring with him. Every person liable to work on the road who has been so summoned shall appear at the time and place named, and with the implement directed, and shall work on the road under the direction of the overseer until discharged by him: Provided, that no hand shall be required to work for a less time than seven hours nor a longer time than ten hours in any one day. Any person summoned as aforesaid who shall, by twelve o'clock of the day preceding the one appointed for work on the road, pay to the overseer the sum of one dollar shall be relieved from working on the road for one day. The money thus collected by the overseer shall be by him applied on the working and repairing of the road: Provided further, that any person who shall furnish one able-bodied hand as a substitute, with the implement directed, shall be held to have complied with this chapter.

Code, s. 2019; 1879, c. 82, s. 5; 1880, c. 30, s. 3.

2724. Sign-posts put up. Overseers shall cause to be set up, at the forks of their respective roads, a post or posts, with arms pointing the way of each road, with plain and durable directions to the most public places to which they lead, and with the number of miles from that place as near as can be computed; and every overseer who shall, for ten days after notice of his appointment, neglect to do so and to keep the same in repair, shall forfeit and pay for every such neglect ten dollars.

Code, s. 2030; R. C., c. 101, s. 18; 1784, c. 227, s. 11; 1812, c. 846.

2725. Mile-posts put up correctly. Every overseer of a road shall cause the same to be exactly measured, where it has not already been done, and at the end of each mile, shall mark in a plain, legible, and durable manner, the number of the miles, beginning, continuing, and marking the numbers in such manner and form as the board of supervisors shall direct; and every overseer shall keep up and repair such marks and numbers of his road. If an overseer shall neglect any of the duties prescribed in this section, for the space of thirty days after his appointment to office, he shall forfeit and pay four dollars, and the like sum for every thirty days thereafter the said marking may be neglected.

Code, s. 2032; R. C., c. 101, s. 20; 1784, c. 227, s. 11.

2726. Penalty for neglecting duty. Every overseer who shall neglect to do any other duty, by this chapter directed to be done, or who shall not keep the roads and bridges clear and in repair, or shall let them remain uncleared or out of repair, during the space of ten days, unless hindered by extreme bad weather, shall forfeit for every such offense four dollars, and be liable for such damages as may be sustained: Provided, that nothing in this section shall excuse any neglect of duty by an overseer, as the same is prescribed in any other part of this chapter.

Code, s. 2033; R. C., c. 101, s. 21; 1784, c. 227, s. 14.

IX. WHO TO WORK.

2727. Who liable. All able-bodied male persons between the ages of eighteen years and forty-five years shall be required under the provisions of this chapter to work on the public roads, except the members of the board of supervisors of public roads, but no person shall be compelled to work more than six days in any one year, except in case of damage resulting from a storm: Provided, that ten days instead of six days shall be the limit as to the counties west of the Blue Ridge.

Code, s. 2017; 1879, c. 82, s. 4; 1880, c. 30, s. 2; 1826, c. 26.

2728. Who exempt; how exemption obtained. No person between the ages prescribed shall be exempted from working upon the public roads, except such as shall be exempted by the general assembly, or by the board of supervisors of the township, on account of personal infirmity, of which the said board shall be the sole judge.

Code, s. 2018; R. C., c. 101, s. 12; 1784, c. 227, ss. 8, 9; 1826, c. 26, ss. 1, 2.

X. GENERAL PROVISIONS.

2731. Traction engines allowed on roads. It shall be lawful for any person to run and use traction engines and road steamers upon the public roads.

Code, s. 2061; 1870-1, c. 162.

2732. Owners of land or timber used on road, remedy for. The owner of any land or timber used for building or repairing public roads, may file his petition before the board of commissioners of the county wherein the injury is done; and, for damages sustained thereby, the board shall make the petitioner adequate compensation: Provided, that this and section twenty-seven hundred and twenty-one shall not apply to the lands adjoining or contiguous to the causeway, or great road leading across Eagle's island to Wilmington.

Code, s. 2028; R. C., c. 101, s. 16; 1818, c. 976, s. 2.

CHAPTER 69.

SALARIES AND FEES.

| | Sections. |
|----------------------------|------------|
| I. Legislative department, | 2734—2740 |
| II. Executive department, | 2741—2767 |
| III. Judicial department, | 2768—2775 |
| IV. General provisions, | 2776—2778, |
| V. County officers, | 2779—2792 |
| VI. Township officers, | 2793—2795 |
| VII. Commissioners, | 2796—2802 |
| VIII. Miscellaneous, | 2803—2812 |

I. LEGISLATIVE DEPARTMENT.

2734. Members of general assembly and presiding officers. The members of the general assembly for the term for which they have been elected, shall receive as a compensation for their services the sum of four dollars per day for each day of their session, for a period not exceeding sixty days; and should they remain longer in session, they shall serve without compensation. They shall also be entitled to receive ten cents per mile, both while coming to the seat of government and while returning home, the said distance to be computed by the nearest line or route of public travel. The compensation of the presiding officers of the two houses shall be six dollars per day and mileage. Should an extra session of the general assembly be called, the members and presiding officers shall receive a like rate of compensation for a period not exceeding twenty days.

Const., Art. II, s. 28.

2735. Clerks and doorkeepers. The principal and his assistant clerks, the engrossing clerks and doorkeepers and assistant doorkeepers of the general assembly, and the chief clerk and assistants, appointed by the secretary of state to supervise the enrollment of bills and resolutions, shall each receive four dollars per day, during the session of the general assembly, and the same mileage as members of the general assembly.

Code, ss. 2871, 2872; 1903, c. 5, s. 5; 1901, c. 631; 1899, cc. 6, 7.

2736. Copyists. Copyists employed in copying engrossed or enrolled bills and resolutions of the general assembly shall receive ten cents per copy sheet, which shall include the making of one carbon copy.

1903, c. 5.

2737. Principal clerks, extra compensation. The principal clerks of the general assembly shall be allowed one hundred dollars as a compensation for indexing the journals of their respective houses, and two hundred dollars each for extra work and for services required to be performed by them after the adjournment of each session of the general assembly, including the transcribing of a copy of their respective journals, which shall be filed in the office of the secretary of state.

Code, s. 2868; 1866-7, c. 71; 1881, c. 292.

2738. Indexing laws, etc. The assistant to the secretary of state who shall index the laws and prepare the laws and captions for publication shall receive a compensation of five hundred dollars.

1903, c. 3.

2739. Temporary doorkeepers. The persons appointed to place the two halls of the general assembly in order, and to wait upon the members until doorkeepers can be regularly appointed, shall be allowed, as a compensation, the sum of four dollars each for their daily attendance and services.

Code, s. 2871; R. C., c. 52, s. 38; 1846, c. 63, s. 2.

2740. Employees, how paid. The auditor is authorized to audit the account of any employee of the senate or of the house of representatives, upon the certificate of the president of the senate and of the speaker of the house of representatives that such services have been rendered for which the account is presented, and that the amount as stated in said account is reasonable, just and proper.

Code, s. 2873; 1870-1, res. p. 508.

II. EXECUTIVE DEPARTMENT.

2741. Governor. The salary of the governor shall be four thousand dollars per annum.

Code, s. 3720; 1901, c. 8; 1879, c. 240.

2742. Private secretary. The private secretary to the governor shall be allowed an annual salary of twelve hundred dollars, and he shall charge and collect the following fees, to be paid by the persons for whom the services are rendered, namely: For the commission of a judge, solicitor, senator in congress, representative in congress, notary public, or a place of profit, two dollars and fifty cents each; for a testimonial, one dollar; for affixing the seal to a grant, twenty-five cents; and for affixing the great seal of the state to state bonds, ten cents. All fees, except fifty cents on each commission issued, which shall be retained by the private secretary for his services,

received by the private secretary shall be paid into the treasury quarterly. The private secretary to the governor shall be ex officio secretary of the board of public buildings and grounds, and secretary of the council of state, and shall be allowed an annual salary of two hundred dollars for the performance of such duties. He shall be ex officio secretary of the board of internal improvements, and shall be allowed five dollars per day for each day the board is in session.

Code, ss. 1689, 3721; 1901 (Pr.), c. 405; R. C., c. 102, s. 12; 1856-7, p. 71, res.; 1881, c. 346; 1903, c. 729.

2743. Executive clerk. The governor is allowed a clerk at a salary of six hundred dollars per annum.

Code, s. 3722; 1876-7, p. 589, res.; 1881, c. 218.

2744. Employees at executive mansion. The governor shall be allowed a watchman at the executive mansion at ten dollars a week, and a gardener at seven dollars a week.

2745. Treasurer. The salary of the treasurer shall be three thousand dollars per annum. He shall be allowed three clerks at salaries respectively of eighteen hundred, one thousand two hundred and nine hundred dollars per annum; and a clerk at seven hundred and twenty dollars per annum.

Code, s. 3723; 1891, c. 505.

2745a. Committee to examine treasurer's and auditor's books. The committee appointed by the general assembly to examine the books of the treasurer and auditor shall receive the same per diem for the number of days engaged at the offices in Raleigh, and mileage to and from the city of Raleigh, as is received by members of the general assembly.

Code, s. 3360; 1885, c. 334.

2746. Secretary of state. The salary of the secretary of state shall be two thousand dollars per annum. He shall be allowed two clerks at salaries of fourteen hundred dollars per annum each; and a clerk at seven hundred and twenty dollars per annum. All fees received by him shall be paid into the state treasury, unless otherwise directed by law. He shall also be allowed two hundred and fifty dollars per annum for additional clerical assistance in the discharge of the duties of his office, to be paid on warrant to the persons performing such work.

Code, s. 3724; 1901, c. 2, s. 108; 1879, c. 240, s. 6; 1881, p. 632.

Note. For fees on organization of corporations, see s. 1107.

For fees on trademarks, see s. 2985.

2747. Secretary of state, fees collected. The secretary of state shall collect the following fees, namely: Copying and certifying a will, grant or patent not exceeding two copy-sheets, fifty cents, and for every additional copy-sheet, ten cents; correcting an error not made by himself in a patent, fifty cents; copying and certifying a plot and survey, fifty cents for each warrant or for each six hundred and forty acres contained in the plot or survey, not to exceed five dollars for one copy; receiving surveyor's return, making out, recording and endorsing grants, sixty cents; each certificate, ten cents; filing and recording a copy of a judgment vacating a grant and all other services thereon, fifty cents; copying an entry from the journals of the assembly, forty cents; copying and certifying the laws of other states, twenty cents for each copy-sheet; and in all cases not otherwise provided for, the secretary of state shall receive for copies of records from his office, one dollar for the first three copy-sheets and ten cents a copy-sheet thereafter.

Code, s. 3725; R. C., c. 102, s. 13; 1870-1, c. 81, s. 3; 1881, c. 79.

2748. Fees on returns to secretary of state. All officers required to make returns to the secretary of state shall receive for such returns five cents per copy-sheet, to be audited on the certificate of the secretary of state, and paid as other claims against the state.

Code, s. 3759; 1868-9, c. 279, s. 557.

2749. Auditor. The auditor shall receive a salary of two thousand three hundred dollars per annum, and shall be allowed no fees or other compensation whatever. He shall be allowed one clerk at a salary of one thousand five hundred dollars per annum, one clerk at a salary of one thousand dollars per annum, and a clerk at a salary of seven hundred and twenty dollars per annum.

Code, s. 3726; 1885, c. 352; 1899, c. 433; 1879, c. 240, s. 7; 1881, c. 213.

2750. Superintendent of public instruction. The superintendent of public instruction shall receive an annual salary of two thousand dollars, and five hundred dollars per annum in lieu of and in commutation for traveling expenses. He shall be allowed two clerks at a salary of one thousand dollars per annum each, and a stenographer at five hundred dollars per annum.

Code, s. 3727; 1901, c. 4, ss. 9, 11; 1903, c. 435, s. 2; 1903, c. 567, s. 7; 1903, c. 603; 1879, c. 240, s. 8.

2751. Attorney general. The attorney general shall receive an annual salary of two thousand dollars and also one hundred dollars for each term of the supreme court which he shall attend and the fees allowed by law. He shall be allowed a clerk at a salary of one thousand dollars per annum, and shall be allowed his actual travel-

ing expenses when his official duties require him to leave the city of Raleigh.

Code, ss. 3728, 3729; 1889, c. 274; 1893, c. 379.

2752. Fees of attorney general. In all appeals to the supreme court of persons convicted of criminal offenses, a fee of ten dollars against each person who shall not reverse the judgment shall be allowed the attorney general, to be taxed among the costs of that court.

Code, s. 3737; 1873-4, c. 170.

Note. For fees in actions by corporation commission, see ss. 1151, 1158.

2753. State librarian. The salary of the state librarian shall be twelve hundred dollars per annum. He shall be allowed one assistant at a salary of three hundred dollars per annum; and shall be allowed a commission of ten per centum upon the sales of colonial and state records and regimental histories; and during the sessions of the general assembly he shall receive one dollar per day additional for keeping the record room open.

Code, s. 3604; 1903, c. 503; 1889, p. 519.

2753a. Commissioner of agriculture. The salary of the commissioner of agriculture shall be two thousand dollars per annum, which shall be paid out of the fertilizer tax fund.

1901, c. 479, s. 4.

2754. Adjutant general. The salary of the adjutant general shall be one thousand dollars per annum. The adjutant general shall be allowed all such necessary expenses as may be incurred in printing, clerk hire, making the blank forms, books, orders and reports required in his office not to exceed one thousand dollars.

Code, ss. 3275, 3730; 1899, c. 390, ss. 2, 3; 1879, c. 240, s. 10; 1883, c. 283, s. 2.

2755. Paymaster general. The paymaster general shall receive an annual salary of two hundred and fifty dollars, payable out of the appropriation for the support of the national guard in this state.

1903, c. 548, s. 7.

2756. Quartermaster general. The quartermaster general shall receive an annual salary of five hundred dollars.

1899, c. 390, s. 2.

2757. Militia officers. No staff officer of the national guard who receives a salary from the state shall receive any further compensation unless ordered into actual service in time of war, insurrection or riot.

2758. Commissioner of labor and printing. The salary of the commissioner of labor and printing shall be fifteen hundred dollars, and three hundred dollars per annum in lieu of and in commutation for traveling expenses. He shall be allowed a stenographer at a salary of six hundred dollars per annum. He shall be allowed two hundred and fifty dollars per annum to be expended for postage and other incidental office expenses, to be paid for on warrant by the auditor on itemized accounts of such expenses. The salary of assistant commissioner of labor and printing shall be one thousand dollars per annum.

1899, c. 373.

2759. Corporation Commissioners. The salary of the corporation commissioners shall be two thousand five hundred dollars per annum each, and actual traveling expenses while on official business. The salary of the clerk of the corporation commission shall be two thousand one hundred dollars per annum, and the salary of the tax clerk shall be one thousand two hundred dollars per annum. They shall be allowed a stenographer at a salary of eight hundred and forty dollars per annum.

1899, c. 164, s. 31.

2760. Bank examiners. One examination each year shall be designated as the annual examination, and for each examination the bank, corporation, association, or individual so examined shall pay into the office of the corporation commission, to be paid to the examiners, an examination fee as follows: Banks, banking institutions or individuals doing a banking business, having a capital of twenty-five thousand dollars or less, shall pay a fee of fifteen dollars; those having a capital stock of more than twenty-five thousand dollars and not over fifty thousand dollars, twenty-five dollars; those having a capital stock of over fifty thousand dollars, thirty dollars. The expenses incurred and services, other than examinations performed especially for any bank, shall be paid by such bank or banking institution. No bank shall be compelled to pay for more than one examination in each year, unless it shall appear from report, examination or otherwise that the condition of any bank or banking institution or banker is precarious, or in any way unsatisfactory, when it shall be the duty of the commission to order a special examination, which shall be paid for as regular examinations.

1903, c. 275, s. 25.

2761. Insurance commissioner. The salary of the insurance commissioner shall be two thousand dollars per annum. He shall be allowed one clerk with a salary of one thousand two hundred dollars per annum, one clerk with a salary of six hundred dollars per

annum, and a stenographer with a salary of six hundred dollars per annum. To reimburse the commissioner for his services and expenses in inspecting state property and placing insurance thereon, he is allowed to collect a sum not exceeding three per centum of the premiums thereon of the agent writing the insurance.

1899, c. 54, ss. 3, 8; 1903, c. 42; 1901, c. 710; 1903, c. 771, s. 3.

2762. Board of internal improvements. The members of the board of internal improvements shall receive, each, five dollars per day, and their traveling expenses for the time they may be employed in the public service.

Code, s. 1639; 1903, c. 729.

2763. State standard-keeper. The state standard-keeper shall be allowed such compensation for his services as the governor shall deem adequate, not exceeding one hundred dollars a year.

Code, s. 3845; 1866-7, p. 228; 1881, c. 199, s. 4.

2764. State board of elections. The members of the state board of elections shall receive in full compensation for their services four dollars per day for the time they are actually engaged in the discharge of their duties, together with their actual traveling expenses, and such other expenses as are necessary and incident to the discharge of the duties imposed by the law relating to elections.

1901, c. 89, s. 7.

2765. Presidential electors. Presidential electors shall be allowed for their traveling expenses to and from the city of Raleigh and their attendance, the same compensation as may be allowed members of the general assembly, and shall be entitled to the same privileges.

1901, c. 89, s. 84.

2766. Laborers. There shall be employed by the board of public buildings and grounds eleven laborers to be assigned to the various state and judicial departments, and one to the corporation commission, who shall receive seven dollars per week, each; one janitor of the capitol with a salary of six hundred dollars per annum; one watchman with a salary of six hundred dollars per annum; one watchman with a salary of five hundred and twenty dollars per annum; one janitor of the supreme court building with a salary of six hundred dollars per annum; one engineer with a salary of eight hundred dollars per annum; all to be paid by the treasurer on the pay rolls of the keeper of the capitol. The board of public buildings may employ such additional laborers as may be from time to time needed; and may pay additional compensation to the laborer assigned to the water-closets of the capitol.

Code, ss. 951, 3732; 1893, cc. 389, 306; 1899, c. 482; 1901, c. 624.

2767. Laborer's leave of absence, commutation. Every laborer, waiter and messenger permanently employed under authority of law in and about the public buildings and grounds at a salary not exceeding four hundred dollars per annum, who shall have served faithfully therein for the space of one continuous year, shall be entitled to fifteen days leave of absence per annum, with full pay at the end of every year of such service.

1897, c. 274.

III. JUDICIAL DEPARTMENT.

2768. Supreme court justices. Each justice of the supreme court shall be paid an annual salary of twenty-five hundred dollars, and two hundred and fifty dollars per annum in lieu of and in commutation for traveling expenses. They shall also be allowed two hundred dollars per annum each for a clerk.

Code, s. 3733; 1891, c. 193; 1903, c. 805.

2769. Superior court judges. The salary of the judges of the superior courts shall be twenty-five hundred dollars per annum, and two hundred and fifty dollars per annum in lieu of and in commutation for traveling expenses. They shall also receive their actual expenses incurred in attending and holding special terms of court by assignment of the governor, which expenses shall be paid by the county in which such special term is held.

Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167.

2770. Certificates of courts held by judges. Every judge of the superior court shall produce a certificate from the clerk of each county of his having held the court of the county according to law; and for every such certificate omitted to be produced, there shall be a deduction from his salary of one hundred dollars, unless he shall be prevented by sickness or other unavoidable cause.

Code, s. 3735; R. C., c. 102, s. 4; 1868-9, c. 46, s. 7; 1879, c. 240, s. 5.

2771. Solicitors. The solicitors of the several judicial districts shall receive twenty dollars for each term of the superior court they shall attend; warrant by the auditor to issue therefor upon a certificate of such attendance from the clerk of the court, and the fees as prescribed in the following section.

Code, s. 3736; 1879, c. 240, s. 12.

2772. Fees of solicitors. The solicitors shall, in addition to the general compensation allowed them by the state, receive the following fees, and no other, namely:

For every conviction upon an indictment which they may prosecute for a capital crime, twenty dollars.

For perjury, forgery, counterfeiting, passing or attempting to pass or sell any forged or counterfeited paper or evidence of debt; maliciously injuring or attempting to injure any railroad or railroad car, or any person traveling on such railroad car; stealing or obliterating records; stealing, concealing, destroying or obliterating any will; maliciously burning or attempting to burn houses or bridges; misdemeanors of accessories after the fact to felonies; in each of the above cases, ten dollars.

For larceny, receiving stolen goods, embezzlement, frauds, maims, deceipts and escapes, five dollars.

For all other offenses, four dollars.

The fees in all the above cases are to be taxed in the costs against the party convicted; but where the party convicted is insolvent, the solicitor's fees shall be one-half, to be paid by the county in which the indictment was found, except that for convictions in capital felonies, forgery, perjury and conspiracy, when they shall receive full fees: Provided, that no larger fee than ten dollars shall be taxed for the solicitor in any indictment against the justices of the peace of any county, as justices, when there are more than three justices who are found guilty.

The solicitors of the several judicial districts and criminal courts shall prosecute all penalties, and forfeited recognizances entered in their courts respectively, and as compensation for their services shall receive a sum to be fixed by the court, not more than five per centum of the amount collected upon such penalty or forfeited recognizance.

For performing his duty for the appointment of a receiver of an estate of a minor, they shall receive not to exceed ten dollars, to be fixed by the judge; and in passing on the returns of the receivers in such cases where the estate of the infant does not exceed five hundred dollars, the fee of the solicitor shall not exceed five dollars, and where the estate exceeds five hundred dollars, his fee shall not exceed ten dollars, to be fixed by the judge, and in each case to be paid out of the fund.

Code, s. 3737; 1885, c. 130; 1895, c. 14; 1901, c. 4, s. 5; 1873-4, c. 170.

Note. For suits by corporation commission, see s. 1158.

For fees for investigating lynchings, see s. 1235.

2773. Supreme court clerk. The clerk of the supreme court shall receive an annual salary of three hundred dollars, to be paid semi-annually, on a certificate of the justices; and, in addition thereto, the following fees, namely: For recording the papers and proceedings in the causes decided in the supreme court, which are required by law to be recorded, such compensation as may be estimated by the justices of the court at each term, not to exceed thirty cents for each page recorded, to be paid by the treasurer on the certifi-

cate of the justices; for entering an appeal, one dollar; a continuance, thirty cents; a scire facias, eighty cents; a certiorari, eighty cents; a determination, two dollars; a certificate, sixty cents; a fieri facias, or other execution, fifty cents; a seal, twenty-five cents; a transcript, or copy of a record, twenty cents for each copy-sheet; a rule given for service, twenty-five cents; a rule not for service, fifteen cents; a subpoena, writ, or other process, one dollar; a commission, fifty cents; drawing a decree or judgment, by the copy-sheet, forty cents; a search, ten cents; affixing the seal to any writing requiring it, twenty-five cents; and an affidavit, twenty-five cents.

Code, s. 3738; R. C., c. 102, ss. 25, 26; 1870-1, c. 139, s. 7.

2774. Supreme court marshal. The salary of the marshal of the supreme court shall be twelve hundred dollars per annum; and he shall perform the duties of librarian without additional compensation.

Code, ss. 950, 3606; 1889, c. 482; 1873-4, c. 34; 1881, c. 306.

Note. See Courts—Supreme.

2775. Supreme court reporter. The compensation of the supreme court reporter shall not exceed one thousand two hundred and fifty dollars per annum to be fixed by the court.

Code, ss. 3363, 3728; 1893, c. 379; 1897, c. 429.

NOTE. See Courts—Supreme.

IV. GENERAL PROVISIONS.

2776. Salaries payable monthly. All annual salaries shall be paid monthly out of any money in the treasury not otherwise appropriated.

Code, s. 3731; 1893, c. 54.

2777. Expense allowances. All officers who are allowed by law any sum for personal, official or traveling expenses shall, before a warrant is drawn for such expenses, file with the auditor a detailed statement of such expenses: Provided, this section shall not apply to any officer to whom an allowance is made in lieu of or in commutation for traveling expenses.

2778. Clerical assistance. All appropriations or allowances for clerical assistance or service shall be paid by warrant drawn in favor of the person performing the work, and in no case shall any part of such sums be paid to any person to whom a salary is paid by the state.

V. COUNTY OFFICERS.

2779. Superior court clerk. The fees of the clerk of the superior court shall be the following, and no other, namely:

Advertising and selling under mortgage in lieu of bond, two dollars. See s. 233.

Affidavit, including jurat and certificate, twenty-five cents.

Appeal from justice of the peace, fifty cents.

Appeal from the clerk to the judge, fifty cents.

Appeal to the supreme court, including certificate and seal, two dollars.

Appointing and qualifying justices of the peace, to be paid by the justice, twenty-five cents.

Apprenticing infant, including indenture, one dollar.

Attachment, order in, fifty cents.

Auditing account of receiver, executor, administrator, guardian or other trustee required to render accounts, if not over three hundred dollars, fifty cents; if over three hundred dollars and not exceeding one thousand dollars, eighty cents; if over one thousand dollars, one dollar.

Auditing final settlement of receiver, executor, administrator, guardian or other trustee required to render accounts, one half of one per cent. of the amount on which commissions are allowed to such trustee, for all sums not exceeding one thousand dollars; and for all sums over one thousand dollars, one-tenth of one per cent. on such excess; but such fees shall not exceed fifteen dollars, unless there be a contest, when the clerk shall have one per cent. on the said excess over one thousand dollars; but in no instance shall his fees exceed twenty-five dollars.

Auditing and recording the final account of commissioners appointed to sell real estate, one-half of the fees allowed for auditing and recording final accounts of executors.

Bill of costs, preparing same, twenty-five cents.

Bond or undertaking, including justification, sixty cents.

Cancelling notice of lis pendens, twenty-five cents.

Capias, each defendant, one dollar.

Caveat to a will, entering and docketing same for trial, one dollar.

Certificate, except where it is a charge against the county, twenty-five cents; and where it is a charge against the county, the fee shall be such sum not exceeding twenty-five cents as the board of commissioners shall allow.

Commission, issuing, seventy-five cents.

Continuance, thirty cents.

Docketing *ex parte* proceedings, fifty cents.

Docketing indictment, twenty-five cents.

Docketing liens, twenty-five cents.

Docketing judgment, twenty-five cents.

Docketing summons, twenty-five cents.

Execution and return thereon, including docketing, fifty cents; and certifying return to clerk of any county where judgment is docketed, twenty-five cents.

Filing each pleading, ten cents.

Filing all other papers, ten cents for each case.

Guardian, appointment of, including taking bond and justification, one dollar.

Impaneling jury, ten cents.

Indexing judgment on cross-index book, ten cents for the judgment regardless of number of parties.

Indexing liens on lien book, ten cents.

Indictment, each defendant in the bill, sixty cents.

Injunction, order for, including taking bond or undertaking and justification, one dollar.

Judgment, final, in term-time, civil action, one dollar.

Judgment, final, against each defendant, in criminal actions, one dollar.

Judgment, final, before the clerk, fifty cents.

Judgment by confession, without notice, all services, three dollars.

Judgment in favor of widow for year's support, fifty cents.

Judgment nisi, entering against a defaulting witness or juror, on bail bond or recognizance, twenty-five cents.

Juror ticket, including jurat, ten cents.

Justification of sureties on any bond or undertaking, except as otherwise provided, fifty cents.

Letters of administration, including bond and justification of sureties, one dollar.

Motions, entry and record of, twenty-five cents.

Notices, twenty-five cents; and for each name over one, in same paper, ten cents additional.

Notifying solicitors of removal of guardian, one dollar.

Order enlarging time for pleading, and all interlocutory orders, in special proceedings and civil actions, twenty-five cents.

Order of arrest, one dollar.

Order for appearance of apprentice, on complaint of master, one dollar; for appearance of master on complaint of apprentice, one dollar.

Order for the registration of a deed or other writing, which has been proved or acknowledged in another county, or before a judge, justice, notary or other officer, except a chattel mortgage, twenty-five cents.

Postage, actual amount necessarily expended.

Presentment, each person presented, ten cents.

Probate of a deed or other writing, proved by a witness, including the certificate, twenty-five cents.

Probate of a deed or other writing, acknowledged by the signers or makers, including all except married women who acknowledge at the same time, with the certificate thereof, twenty-five cents.

Probate of a deed, or other writing, executed by a married woman, for her acknowledgment and private examination, with the certificate thereof, twenty-five cents.

Probate of a chattel mortgage, including the certificate, ten cents.

Probate of a short form lien bond, or lien bond and chattel mortgage combined, ten cents, in the following counties: Alamance, Alleghany, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Carteret, Caswell, Catawba, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Gates, Granville, Greene, Harnett, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Onslow, Pender, Perquimans, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Union, Vance, Washington, Watauga, Wayne, Wilson.

Probate of limited partnership, fifty cents.

Probate of will in common form and letters testamentary, one dollar.

Qualifying justice of the peace, to be paid by the justice, twenty-five cents.

Qualifying members of the board of commissioners, to be paid by the commissioners, twenty-five cents.

Recognizance, each party where no bond is taken, twenty-five cents.

Recording and copying papers, per copy-sheet, ten cents.

Recording names, qualification, and expiration of term of office of justices of the peace, five cents for each name.

Registering trained nurses, including certificate of registration, fifty cents.

Recording certificates of incorporation of corporations, three dollars.

Recording names of jurors as required by law, five cents for each name.

Registration of guardian, relinquishment of right to administer, or to qualify as executor, receiving, filing and noting same, twenty-five cents.

Seal of office, when necessary, twenty-five cents.

Subpoena, each name, fifteen cents.

Summons, in civil actions or special proceedings, including all the names therein, one dollar, and for every copy thereof, twenty-five cents.

Transcript of judgment, twenty-five cents.

Transcript of any matter of record or papers on file, per copy-sheet, ten cents.

Trial of any cause, or stating an account, as referee, pursuant to order of the judge, such allowance as the judge may make.

Witness ticket, including jurat, ten cents.

Five per cent. commissions shall be allowed the clerk on all fines, penalties, amercements and taxes paid the clerk by virtue of his office; and three per cent. on all sums of money not exceeding five hundred dollars placed in his hands by virtue of his office, except on judgments, decrees, and executions; and upon the excess over five hundred dollars of such sums, one per cent.

In Robeson county the board of commissioners may make an allowance to the clerk of the superior court for keeping the records of the court and transcribing the minutes, to be paid out of the general county fund.

Code, ss. 229, 1739, 3109, 3739; 1885, c. 199; 1893, c. 52, s. 4; 1897, c. 68; 1899, c. 17, s. 2; 1899, c. 247, s. 3; 1899, cc. 578, 261; 1901, cc. 121, 614, s. 3; 1903, c. 359, s. 6.

Note. Judge fixes in certain settlements, see s. 150.

For compensation for keeping money paid into court, see Administration, s. 150.

For fees organization of corporations, see s. 1107.

2780. Clerks must keep fee bill posted. Every clerk shall keep posted in his office in some conspicuous place the fee bill, for public inspection and reference, under a penalty of one hundred dollars for such neglect, to be paid to any person who will sue for the same.

Code, s. 3740.

2781. Coroners. Fees of coroners shall be the same as are or may be allowed sheriffs in similar cases:

For holding an inquest over a dead body, five dollars; if necessarily engaged more than one day, for each additional day, five dollars.

For burying a pauper over whom an inquest has been held, all necessary and actual expenses, to be approved by the board of county commissioners, and paid by the county.

It shall be the duty of every coroner, where he or any juryman shall deem it necessary to the better investigation of the cause or manner of death, to summon a physician or surgeon, who shall be paid for his attendance and services ten dollars, and such further sum as the commissioners of the county may deem reasonable. But in the county of Buncombe, when the coroner is a physician and surgeon he shall, at the request of one or more of the jurymen, make the investigation as to the cause and manner of death, and shall receive such fee or compensation as the board of commissioners of Buncombe county shall deem just and reasonable, in addition to the fee for holding the inquest over said dead body.

Code, s. 3743; 1903, c. 781.

2782. Register of deeds. The register of deeds shall be allowed, while and when acting as clerk to the board of commissioners, such per diem as such board may respectively allow, not exceeding two dollars; and shall be allowed the following fees for his services as register of deeds:

For registering any deed or other writing authorized to be registered by them, with certificate of probate or acknowledgment and private examination of a married woman, containing more than three copy-sheets, eighty cents; and for every additional copy-sheet, ten cents.

Registering short form of lien bond, or lien bond and chattel mortgage combined, fifty cents in the county of Anson; twenty cents in the counties of Chatham, Columbus, Cleveland, Franklin, Iredell, Johnston, Mecklenburg, and Union; and thirty cents in the counties of Alamance, Alleghany, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Carteret, Caswell, Catawba, Chowan, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Granville, Greene, Harnett, Jones, Lenoir, Lincoln, Martin, McDowell, Moore, Nash, New Hanover, Onslow, Pender, Perquimans, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Vance, Washington, Watauga, Wayne and Wilson.

For comparing and certifying a copy of any instrument filed for registration, when the copy is furnished by the party filing the instrument for registration and at the time of filing, one dollar.

For a copy of any record or any paper in their offices, like fees as for registering the same.

For issuing each notice required by the county commissioners, including subpoenas for witnesses, fifteen cents. This shall not include county orders issued on the treasury.

Recording and issuing each order of commissioners, ten cents. Where a standing order is made for the payment of money, monthly or otherwise, there shall be charged but one fee therefor.

Making out original tax list, two cents for each name thereon; for each name on each copy required to be made, two cents.

Issuing marriage license, one dollar.

For transcript and certificate of limited partnership, fifty cents.

For recording the election returns from the various voting precincts, ten cents per copy-sheet, to be paid by the county.

Code, ss. 710, 3109, 3751; 1887, c. 283; 1891, c. 324; 1897, cc. 27, 68; 1899, c. 17, s. 2; 1899, c. 247, s. 3; 1899, cc. 261, 578, 723; 1901, c. 294; 1903, c. 792; 1899, c. 302.

Note. For fees in relation to strays, see Strays.

For registering affidavits of sales for taxes, see s. 2905.

2783. Sheriffs. Sheriffs shall be allowed the following fees and expenses, and no other, namely:

Executing summons or any other writ or notice, sixty cents; but the board of county commissioners may fix a less sum than sixty cents, but not less than thirty cents, for the service of each road order.

Arrest of a defendant in a civil action and taking bail including attendance to justify, and all services connected therewith, one dollar.

Arrest of a person indicted, including all services connected with the taking and justification of bail, one dollar.

Imprisonment of any person in a civil or criminal action, thirty cents; and release from prison, thirty cents.

Executing subpoena on a witness, thirty cents.

Conveying a prisoner to jail to another county, ten cents per mile.

For prisoner's guard, if any necessary, and approved by the county commissioners, going and returning, per mile for each, five cents.

Expense of guard and all other expenses of conveying prisoner to jail, or from one jail to another for any purpose, or to any place of punishment, or to appear before a court or justice of the peace in another county, or in going to another county for a prisoner, to be taxed in the bill of costs and allowed by the board of commissioners of the county in which the criminal proceedings were instituted.

For allotment of widow's year's allowance, one dollar.

In claim and delivery for serving the original papers in each case, sixty cents, and for taking the property claimed, one dollar, with the actual cost of keeping the same until discharged by law, to be paid on the affidavit of the returning officer.

For conveying prisoners to the penitentiary, two dollars per day and actual necessary expenses; also one dollar a day and actual necessary expenses for each guard, not to exceed one guard for every three prisoners, as the sheriff upon affidavit before the clerk of the superior court of his county shall swear to be necessary for the safe conveyance of the convicts, to be paid by the state treasurer upon the warrant of the auditor, out of any money in the treasury not otherwise appropriated. The sheriff shall file with the auditor the affidavit above mentioned, together with a fully itemized account, to be sworn to before the auditor, showing the number of days requisite for coming and returning and the actual expense of conveying said convicts and the guard necessary for their safe-keeping, and if the auditor approves said account, he shall issue his warrant on the treasurer for the amount thereof.

Providing prisoner in county jail with suitable beds, bed-clothing, other clothing and fuel, and keeping the prison and grounds cleanly, whatever sum shall be allowed by the commissioners of the county.

Collecting fine and costs from convict, two and a half per cent. on the amount collected.

Collecting executions for money in civil actions, two and a half per cent. on the amount collected; and the like commissions for all moneys which may be paid to the plaintiff by the defendant while the execution is in the hands of the sheriff.

Advertising a sale of property under execution at each public place required, fifteen cents.

Seizing specific property under order of a court, or executing any other order of a court or judge, not specially provided for, to be allowed by the judge or court.

Taking any bond or undertaking, including furnishing the blanks, fifty cents.

The actual expense of keeping all property seized under process or order of court, to be allowed by the court on the affidavit of the officer in charge.

A capital execution, ten dollars, and actual expenses of burying the body.

Summoning a grand or petit jury, for each man summoned, thirty cents, and ten cents for each person summoned on the special venire.

For serving any writ or other process with the aid of the county, the usual fee of one dollar, and the expense necessarily incurred thereby, to be adjudged by the county commissioners, and taxed as other costs.

All just fees paid to any printer for any advertisement required by law to be printed.

Bringing up a prisoner upon habeas corpus, to testify or answer to any court or before any judge, one dollar, and all actual and necessary expenses for such services, and ten cents per mile by the route most usually traveled, and all expenses for any guard actually employed and necessary.

For summoning and qualifying appraisers, and for performing all duties in laying off homesteads and personal property exemptions, or either, two dollars, to be included in the bill of costs.

For levying an attachment, one dollar.

For attendance to qualify jurors to lay off dower, or commissioners to lay off year's allowance, one dollar; and for attendance, to qualify commissioners for any other purpose, seventy-five cents.

Executing a deed for land or any interest in land sold under execution, one dollar, to be paid by the purchaser.

Service of writ of ejectment, one dollar.

For every execution, either in civil or criminal cases, fifty cents.

Whenever any precept or process shall be directed to the sheriff of any adjoining county, to be served out of his county, such sheriff shall have for such service, not only the fees allowed by law, but a further compensation of five cents for every mile of travel going to and returning from service of such precept or process: Pro-

vided, that whenever any execution of five hundred dollars or upwards shall be directed to the sheriff of an adjoining county, under this chapter, such sheriff shall not be allowed mileage, but only the commissions to which he shall be entitled.

The sheriff of Hyde county shall be allowed the sum of two dollars for serving all warrants or capiases or other criminal processes on the waters of Pamlico sound or on the waters of any bay in Hyde county, whenever such sheriff shall be compelled to go by boat or vessel more than two miles from any shore or landing in order to execute such processes. Whenever such sheriff is compelled to go by boat or vessel a distance of more than two miles from any shore or landing in Hyde county to serve any civil process upon the waters of Pamlico sound or any bay in Hyde county, such sheriff, in addition to the fee prescribed by law for serving such process, may add the expense of hiring such boat or vessel, which cost or expense shall be taxed by the clerk of the superior court of the county from which such process issued in the bill of costs in the action in which such process issued. Sheriffs and constables of Hyde and Carteret counties shall receive three dollars for every process executed on board of any boat or vessel lying in the waters between Ocracoke island, Hyde county, and Portsmouth in Carteret county.

Code, ss. 931, 2135, 2089, 2090, 3752; 1885, c. 262; 1891, cc. 112, 143; 1903, c. 541; 1901, c. 64; R. C., c. 102, s. 21; R. C., c. 31, s. 56; 1822, c. 1132.

Note. For serving process from corporation commission, see s. 1138.

For serving notice of garnishment for taxes, twenty-five cents, see s. 2882.

For sales for taxes, see s. 2884.

For making memorandum of redemption of land sold for taxes, see s. 2914.

2784. County treasurer. The county treasurer shall receive as compensation in full for all services required of him such a sum, not exceeding one-half of one per cent. on moneys received and not exceeding two and a half per cent. on moneys disbursed by him as the board of commissioners of the county may allow. As treasurer of the county school fund he shall receive such sum as the board of education may allow him, not exceeding two per cent. on disbursements: Provided, that in counties where his compensation can not exceed the sum of two hundred and fifty dollars, the said treasurer may be allowed a sum not exceeding two and a half per cent. on his receipts and his disbursements: Provided further, the county treasurer of Buncombe county shall receive as a compensation in full for all services required of him seventeen hundred and fifty dollars per annum; the county treasurer of Gaston county shall receive as a compensation in full for all services required of him a yearly salary not exceeding twelve hundred dollars, to be fixed by the commissioners of said county; the county treasurer of Mecklenburg county shall receive as a compensation in full for all services required of him a yearly salary not exceeding twenty-seven hun-

dred and fifty dollars, to be fixed by the commissioners of said county. Said salaries to be in lieu of all commissions allowed by law.

Code, s. 770; 1899, c. 233; 1901, cc. 285, 506; 1903, c. 512.

2785. Examining committee of treasurer's books. The board of commissioners shall allow to the committee who examine the books and moneys of the treasurer the same pay per diem that is received by a member of the board, not to exceed pay for one day's service for each examination.

Code, s. 774; 1879, c. 33.

2786. Standard-keeper. Standard-keepers shall be entitled to receive the following fees, and no other, namely: For examining and adjusting a pair of steelyards, twenty-five cents; every weight of half a pound and upwards, five cents; every set of weights below half a pound, including one piece of each denomination, five cents; for a yard stick, or other measure of cloth, five cents; every bushel, half bushel, peck or other measure used in measuring grain, meal or salt, ten cents; each measure for liquors or wines, three cents, and for extra work on bushel and half-bushel measures a sum not exceeding twenty-five cents in any one case; and for every surveyor's chain, fifty cents.

Code, s. 3753; 1889, c. 406; R. C., c. 102, s. 37; 1870-1, c. 139, s. 3; 1874-5, c. 110.

Note. For compensation of state standard-keeper, see s. 2763.

2787. Finance committee. The members of the finance committee shall each receive such compensation for the performance of his duties as the board of commissioners may allow, not exceeding three dollars per day; but they shall not be paid for more than ten days in any one year.

Code, s. 763; 1871-2, c. 71, s. 5; 1873-4, c. 107.

2788. County superintendent of public instruction. The salary of the county superintendent of schools shall be fixed by the county board of education. It shall not be less than three dollars per day while engaged in the service of the public schools. The county board of education may fix an annual salary not to exceed four per cent of the disbursements for schools under his supervision. The county board of education of any county whose total school fund exceeds fifty thousand dollars may employ a county superintendent for all of his time at such salary as may be fixed by said board: Provided, the county superintendent of Iredell county shall not receive over six hundred dollars per annum.

1901, c. 4, s. 44; 1903, c. 435, s. 19.

2789. County board of pensions. Each member of the county board of pensions shall be entitled to two dollars a day, not exceeding three days in any year, when attending the annual meeting of said board, the said compensation to be paid by the county treasurer on the order of the board of county commissioners.

1903, c. 273 s. 19.

2790. Election officers. The registrar shall receive three cents for each name registered in the new registration when ordered, and thereafter in the revision of the registration book, he shall receive one cent for each name copied from the original registration book. Each chairman of the county board of elections shall be allowed one dollar per day for the time actually employed, and five cents per mile for distance traveled, for making the returns for senators, and each sheriff shall receive thirty cents for each notice he is required to serve under the law providing for holding elections. The compensation allowed officers shall be paid by the county treasurer after being audited by the board of county commissioners. Clerks and registers of deeds shall also be allowed the usual registration fees for recording the election returns, to be paid by the county. The board of state canvassers may employ two clerks at a compensation of four dollars each per day, during the session of the board of state canvassers. The members of the county board of elections shall each be allowed one dollar per day for each day they may be actually employed in the performance of their duties. The registrars and judges of election shall be entitled to such compensation as may be fixed by the board of commissioners of their county, not to exceed one dollar each for holding the election. The election constables or bailiffs shall be entitled to one dollar per day each; and the registrar or judge of election, who shall act as returning officer, shall be allowed one dollar, payable out of the county treasury: Provided, that the registrars shall receive, in addition to the compensation herein allowed for each name registered, the sum of one dollar per day for each Saturday during the period of registration, and on which they attend at the several polling places for the purpose of registering voters or receiving and hearing challenges.

1901, c. 89, s. 62.

2791. County commissioners. Except where otherwise provided by law, each county commissioner shall receive for his services and expenses in attending the meetings of the board not exceeding two dollars per day, as a majority of the board may fix upon, and they may be allowed mileage to and from their respective places of meeting, not to exceed five cents per mile. In Wake a sum not to exceed three dollars per day and like mileage. In Craven such sum for ex-

tra services as a majority may determine. The commissioners acting separately from the chairman may, on the first Monday in December of each term, fix the compensation of the chairman in such sum as they think proper, in the following counties, and subject to the following limitations: In Bertie, Craven, Durham, Halifax, Iredell, Mecklenburg, New Hanover, Northampton, Robeson, Wake and Warren, in their discretion; in Edgecombe, not to exceed three hundred dollars per annum; in Buncombe, not to exceed three dollars per day; in Vance, not to exceed twenty-five dollars per month; in Wilson, not to exceed one thousand dollars per annum. In Wake the board may sit for four consecutive days each month, beginning on the first Monday of each month.

Code, s. 709; 1889, c. 560; 1891, cc. 41, 56, 144, 183, 474; 1899, c. 297; 1901, cc. 49, 429, 708; 1903, cc. 227, 648, 817.

2792. County board of education. The members of the county board of education shall receive the same per diem and mileage as is allowed to the members of the board of county commissioners of their counties.

1901, c. 4, s. 27.

VI. TOWNSHIP OFFICERS.

2793. Constable. Constables shall be allowed the same fees as sheriffs.

Code, s. 3742; 1883, c. 108.

2794. Justices of the peace. Justices shall receive no fees whatever, except the following:

For attachment, twenty cents.

Transcript of judgment, ten cents.

Sunmons, twenty cents; if more than one defendant in same case, for each additional, ten cents.

Subpœna, for each witness, ten cents.

Trial of an issue and judgment, forty cents.

Taking an affidavit, bond or undertaking, or for an order of publication, or an order to seize property, twenty-five cents.

For jury trial and entering verdict, forty cents.

Execution, twenty cents.

Renewal of execution, five cents.

Return to an appeal, thirty cents.

Order of arrest in civil action, twenty cents.

Warrant for arrest in criminal cases, or in bastardy, including the affidavit of complainant, thirty cents.

Warrant of commitment, twenty cents.

Taking depositions on order or commission, per copy sheet, ten cents.

Garnishment for taxes, twenty-five cents. (See s. 2882).

Making necessary certificate and return to same, thirty-five cents.

For examination of women in case of bastardy, twenty-five cents.

For hearing petition for widow's year's allowance, and issuing notice to commissioners, fifty cents.

For filing and docketing laborer's lien, fifty cents.

Probate of a deed or other writing proved by a witness, including the certificate, twenty-five cents; probate of a deed or other writing executed by a married woman for her acknowledgment and private examination, with the certificate thereof, twenty-five cents; probate of a deed or other writing acknowledged by the signers or makers, including all except married women who acknowledge at the same time, with the certificate thereof, twenty-five cents; probate of a chattel mortgage, including the certificate, ten cents.

For issuing all necessary papers and copies thereof and for the trial of an action for claim and delivery, where there is one defendant, the sum of one dollar and fifty cents, and fifty cents for each additional defendant, and ten cents for each subpoena issued in said cause, and twenty-five cents for taking the replevy bond when one is given: Provided, that where the trial of such cause shall have been removed from before the justice of the peace issuing the said papers, the justice of the peace sitting in the trial of such cause shall receive fifty cents of the above costs for such trial and judgment.

For widow's year's allowance, one dollar.

Code, ss. 2135, 3748; 1885, c. 86; 1903, c. 225; 1870-1, c. 130, s. 9; 1883, c. 368.

2795. Justices must itemize bills of cost. Every justice of the peace shall, upon demand made, give to any party to an action before him, an itemized statement of the costs of such action. No person shall be compelled to pay any costs in any trial before a justice of the peace until an itemized statement of the costs has been made out and given to the party charged.

1887, c. 297.

Note. For failure to give an itemized statement of costs on demand, see Crimes.

VII. COMMISSIONERS.

2796. Assessing damages for right of way. The commissioners appointed, under any order of court, to condemn any land, for any railroad or other company or corporation in proceedings to condemn land under and by virtue of any right of eminent domain, shall each receive three dollars per day for each day they are engaged in the performance of their duties.

Code, s. 1946.

2797. In partition. The commissioners appointed by any court to make partition of any land, timber or real estate of any kind, or any personal property, shall each receive the sum of one dollar per diem for his services.
Code, ss. 1901, 1922.

2798. In sale for partition. In sales of real estate or personalty for partition the allowance to the commissioner for making such sale, and for all services therewith, and for making title shall be as follows: For sales of five hundred dollars or less, not more than ten dollars; for sales of over five hundred dollars, two per centum, up to a compensation of forty dollars, and when the allowance shall amount to forty dollars, any additional compensation shall not exceed the rate of one per centum on the excess over ten thousand dollars.
Code, s. 1910.

2799. In partition, land in another state. The commissioners appointed to divide lands lying in this and another state shall be entitled to three dollars per day for their services; which, with all fees, expenses and costs, shall be paid as the court may direct.
Code, s. 1916; 1868-9, c. 122, s. 26.

2800. Assessing damages for mills. Every commissioner appointed in any proceeding to assess the damages arising from the location of any mill, as provided for in the chapter on Mills, shall be entitled to receive two dollars per day.
Code, s. 1863.

2801. Of affidavits. Commissioners of affidavits, and those who are authorized by law to act as such, shall receive the following fees, and no other, namely: For an affidavit taken and certified, forty cents; affixing his official seal, twenty-five cents.
Code, s. 3741.

2802. Receiver selling as. Receivers of property appointed by any order of court, in any proceedings or action, shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent. on the amount received and disbursed by them.
1901, c. 2, s. 88; Code, s. 379, subsec. 4.

NOTE. For compensation of surviving partner settling partnership estate, see s. 2544.

VIII. MISCELLANEOUS.

2803. Jurors. Jurors shall receive such sum as the county commissioners may fix, not exceeding one dollar and fifty cents for each day's attendance at court or inquest, and mileage at the rate of five cents per mile; they shall also be allowed such ferriage and tolls as they may have necessarily incurred.

In Anson, Lenoir, New Hanover, Pender and Union counties the pay of jurors shall be one dollar and fifty cents per day and mileage.

In Craven county, not less than one dollar and fifty cents and not more than two dollars as fixed by the county commissioners.

The same pay shall be allowed to special jurors as talesmen, who shall be summoned to serve and do serve, but they shall not be allowed any mileage or ferriage. In Anson, Pender and Union counties the pay of talesmen shall be one dollar a day without mileage or ferriage.

All who are summoned to appear as special veniremen, who do actually attend and who are not drawn as jurors shall be entitled to prove and receive one day's pay of one dollar each without mileage: This paragraph shall not apply to Rockingham, Durham, Franklin, Duplin, Ashe, Alleghany, Watauga, Cleveland, Macon, Clay, Cherokee, Graham, Richmond, Columbus, Alexander, Sampson, Davidson, Pamlico, Davie, Stokes, Union, Iredell, McDowell, Caldwell, Haywood, Pasquotank, Yadkin, Onslow, Currituck, Yancey, Tyrrell, Jones, Wayne, Pender, Madison, Alamance, Stanly, Cumberland, Forsyth, Catawba, Gaston, Hyde, Anson, Cabarrus, Lenoir, Lincoln, Dare, Mitchell, Craven, Greene, Rutherford, Jackson, Wilson and Nash.

In Madison and Wake counties special veniremen shall also receive mileage and tolls or ferriage.

Code, s. 3747; 1885, c. 344; 1887, c. 188; 1891, c. 187; 1895, c. 254; 1897, c. 280; 1901, c. 320; 1903, c. 152; 1903, c. 341; R. C., c. 28, s. 15; 1870-1, c. 139, s. 6; 1881, c. 53, s. 1.

Note. For jurors at inquests, see s. 999.

For jurors in ascertaining value of dividing fence, see s. 1650.

2804. Jailers. Jailers shall receive, for furnishing prisoner with fuel, one pound of wholesome bread, one pound of good roasted or boiled flesh, and a sufficient quantity of water, with every necessary attendance, a sum not exceeding twenty-five cents per day, unless the board of commissioners of the county shall deem it expedient to increase the fees, which it may do provided such increase shall not exceed fifty per cent. on the above sum. But whatever sum may be fixed on by the commissioners shall be recorded, and shall not be altered within one year thereafter.

Code, s. 3746; R. C., c. 102, s. 38; 1879, c. 87.

2805. Notaries. Notaries public and other persons acting as such shall be allowed the sum of fifty cents for protesting for nonacceptance or for nonpayment, or for both when done at the same time, any order, draft, note, bond or bill or any other thing necessary to be protested, and the sum of ten cents for each notice sent in connection therewith. For other necessary services, where no fee is fixed, they shall be allowed twenty cents for every ninety words. Cases of protest concerning vessels or other cargoes shall not be affected by this section.

Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 734.

2806. Entry-taker. Entry-takers shall receive the following fees, and no other, namely: For an entry, including all services, forty cents; issuing each duplicate warrant, when thereto required, twenty-five cents; for posting and advertising, the applicant shall pay the entry-taker one dollar, and the costs of the newspaper advertisement.

Code, ss. 2765, 3744; R. C., c. 102, s. 32; 1870-1, c. 139, s. 3.

2807. Surveyors and chain-carriers. Surveyors appointed by courts to survey any lands, the boundaries of which may come in question in any suit or proceeding pending therein, or called upon by the commissioners to assist in surveying and dividing the lands of intestates or others, held in common, shall receive the following fees, and no other, namely: For every survey on an entry containing three hundred acres or less, one dollar and sixty cents, and for every hundred more than that quantity, forty cents; for surveying lands in dispute, by order of court, traveling to and from the place, and performing the duty, two dollars per day, or such greater sum as the court may allow; for assisting in surveying and dividing the lands of intestates, or others, held in common, when called upon by the commissioners appointed to make partition, or in laying off dower; traveling to and from the place, and performing the duty, two dollars per day. For assisting in surveying and allotting the homestead exemption of any person when summoned to do so by the sheriff or other lawful officer, for traveling to and from the place and performing the duty, two dollars per day, which shall be taxed in the bill of costs. In all surveys made by order of the court, the chain-carriers shall be allowed such compensation as the court may determine, not exceeding one dollar each per day; and in matters of disputed boundary, which may come in question, in any suit, the court may make to the surveyor such allowance for plots as it may deem reasonable, which, with the allowance to chain-carriers, shall be taxed as costs.

Code, s. 3754; 1893, c. 58, s. 2.

2808. Witnesses. The fees of witnesses, whether attending at a term of court or before the clerk, or a referee, or commissioner, or arbitrator, shall be one dollar per day. They shall also receive mileage, to be fixed by the county commissioners of their respective counties, at a rate not to exceed five cents per mile for every mile necessarily traveled from their respective homes in going to and returning from the place of examination by the ordinary route, and ferriage and toll paid in going and returning. If attending out of their counties, they shall receive one dollar per day and five cents per mile going and returning by the ordinary route, and toll and ferriage expenses. Provided, that witnesses before courts of justices of the peace shall receive fifty cents per day in civil cases, and in criminal actions of which justices of the peace have final jurisdiction, witnesses attending the courts of justices of the peace, under subpoena, shall receive fifty cents per day, and in hearings before coroners witnesses shall receive fifty cents per day and no mileage; but the party cast shall not pay for more than two witnesses subpoenaed, to prove any one material fact, and no prosecutor or complainant shall pay any costs, unless the justice shall find that the prosecution was malicious and frivolous: Provided further, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order. Witnesses attending before the corporation commission shall receive two dollars per day and five cents per mile traveled by the nearest practicable route.

Code, s. 3756; 1891, c. 147; 1901, c. 164, s. 9.

Note. For mileage of witnesses before legislative committee, see General Assembly.

2809. Fees, by whom paid; when in advance. The several officers named in this chapter shall receive the fees hereinbefore prescribed for them respectively, from the persons for whom, or at whose instance, the service shall be performed, except persons suing as paupers; and no officer shall be compelled to perform any service, unless his fee be paid or tendered, except in criminal actions. The said officers shall receive no extra allowance or other compensation whatever, unless the same shall be expressly authorized by statute. In case the service shall be ordered by any proper officer of the state, or of a county, for the benefit of the state or county, the fees need not be paid in advance; but if for the state, shall be paid by the state, as other claims against it are; if for a county, by the board of commissioners, out of the county funds. The fees in criminal cases are not demandable in advance.

Code, ss. 3758, 1173.

Note. For fees in criminal cases, see Criminal Procedure.

2810. Copy-sheet, what constitutes. A copy-sheet shall consist of one hundred words, and in reckoning the number of words in a copy-sheet, every date, or amount of money, expressed in figures, as 1855, \$250.90, shall be estimated and charged as one word.

Code, s. 3757; R. C., c. 102, s. 42; 1868-9, c. 279, s. 556.

2811. Keeper of capitol. The salary of the keeper of the capitol, or superintendent of public buildings and grounds, shall be eight hundred dollars per annum, which shall include his compensation as keeper of the arsenal.

Code, ss. 2302, 2303.

2812. Board of public charities. The members of the board of public charities shall receive as compensation for their services, four dollars per day while attending the sessions of the board, not oftener than four times a year, and not to exceed four days at each session. The printing of all necessary blanks for use of the board shall be paid for as other state printing. The board shall be allowed a clerk at an annual salary of six hundred dollars.

NOTE. For fees of harbor-masters, see s. 2124.

For fees of pilots, see ss. 2133, 2150.

For publishing notice sale of land for taxes, see s. 2904.

For fee for analysis of water supplies, see s. 3025.

CHAPTER 70.

SHERIFF.

| | Sections. |
|-----------------|-----------|
| I. Office of, | 2813—2816 |
| II. Bond, | 2817—2822 |
| III. Duties of, | 2823—2836 |

I. OFFICE OF.

2813. Election for. In each county a sheriff shall be elected by the qualified voters thereof, as is prescribed for members of the general assembly, and shall hold his office for two years.

Const., Art. IV, s. 24.

2814. Ineligibility for. No person shall be eligible to the office of sheriff who is not of the age of twenty-one years, and has not resided in the county in which he is chosen for one year immediately preceding his election, or who is a member of the general assembly.

bly, or practicing attorney, or who theretofore has been sheriff of such county, and hath failed to settle with and fully pay up to every officer the taxes which were due from him.

Code, ss. 2067, 2068, 2069; R. C., c. 105, ss. 5, 6, 7; 1777, c. 118, ss. 2, 4; 1806, c. 699, s. 2; 1829, c. 5, s. 6; 1830, c. 25, ss. 2, 3.

2815. Resignation of. Every sheriff may vacate his office by resigning the same to the board of county commissioners of his county; and thereupon the board may proceed to elect another sheriff.

Code, s. 2077; R. C., c. 105, s. 15; 1777, c. 118, s. 1; 1808, c. 752.

2816. Vacancy in, how filled; guilty of a misdemeanor. If any sheriff shall be convicted of a misdemeanor in office, the court may at its discretion, as a part of his punishment, remove him from office; and on any vacancy in the office, created by this or any other means, the coroner of the county shall execute all process directed to the sheriff, until the first meeting of the county commissioners next succeeding such vacancy, when the board shall elect a sheriff to supply the vacancy for the residue of the term, who shall possess the same qualifications, enter into the same bonds, and be subject to removal, as the sheriff regularly elected; and should the board fail to fill such vacancy, the coroner shall continue to discharge the duties of sheriff until it shall be filled.

Code, s. 2071; R. C., c. 105, s. 11; 1829, c. 5, s. 8.

Note. See also s. 1268.

II. BOND.

2817. County commissioners to take. The board of county commissioners in every county shall take and approve the official bonds of the sheriffs, which they shall cause to be registered and the originals deposited with the clerk of the superior court for safe-keeping. Said bonds shall be taken on the first Monday of December next after the election of sheriffs, but no board shall permit any former sheriff to give bonds for, or re-enter upon the duties of the office, until he has produced before the board the receipt in full of every such officer for taxes which he has or should have collected.

Code, ss. 2066, 2068; 1868, c. 20, s. 32; 1876-7, c. 276, s. 5; R. C., c. 105, s. 6; 1806, c. 699, s. 2; 1830, c. 25, s. 2.

2818. Renewed annually; on failure, office vacant. The sheriff shall renew his bonds annually on the first Monday in December, and produce the receipts in full from the state treasurer, county treasurer, and other persons, of all moneys by him collected, or which ought to have been by him collected, for the use of the state and county, and for which he shall have become accountable; and a

failure of the sheriff to renew his bonds, or to exhibit the aforesaid receipts, shall create a vacancy.

Code, s. 2070; R. C., c. 105, s. 9; 1829, c. 5, s. 5; 1876-7, c. 276, s. 5.

2819. Justification of, required when bond insufficient. It shall be the duty of the board of county commissioners whenever they shall be of opinion that the bonds of the sheriff of their county are insufficient, to notify said sheriff in writing to appear within ten days and give other and better sureties, or justify the sureties on his bonds; and in case such sheriff shall fail to appear on notice, or fail to give sufficient bonds, or to justify his bonds, it shall be the duty of said board to elect forthwith some suitable person in the county as sheriff for the unexpired term, and who shall give proper and lawful bonds and be subject to like obligations and penalties.

Code, s. 2074; 1879, c. 109, s. 2.

2820-1. Commissioners liable for loss, when. If any board of county commissioners shall fail to comply in good faith with the provisions of this subchapter, they shall be liable for all loss sustained in the collection of taxes, on motion to be made by the solicitor of the district.

Code, s. 2075; 1868-9, c. 245, s. 3.

2822. Liability of sureties on. The sureties to a sheriff's bond shall be liable for all fines and amercements imposed on him, in the same manner as they are liable for other defaults in his official duty.

Code, s. 2076; R. C., c. 105, s. 14; 1829, c. 33.

III. DUTIES OF.

2823. To receipt for process. Every sheriff, coroner or constable shall, when requested, give his receipt for all original and mesne process placed in his hands for execution, to the party suing out the same, his agent or attorney; and such receipt shall be admissible as evidence of the facts therein stated, against such officer and his sureties, in any suit between the party taking the receipt and such officer and his sureties.

Code, s. 2081; R. C., c. 105, s. 18; 1848, c. 97.

2824. Execute process; false return, penalty for. Every sheriff, by himself or his lawful deputies, shall execute all writs and other process to him legally issued and directed, within his county, or upon any river, bay, or creek adjoining thereto, or in any other place where he may lawfully execute the same, and make due return thereof, under the penalty of forfeiting one hundred dollars for each neglect, where such process shall be delivered to him twenty days before the sitting of the court to which the same is returnable, to be paid to the party aggrieved by order of the court, upon motion and

proof of such delivery, unless such sheriff can show sufficient cause to the court, at the next succeeding term after the order; and for every false return, the sheriff shall forfeit and pay five hundred dollars, one moiety thereof to the party aggrieved, and the other to him that will sue for the same; and moreover be further liable to the action of the party aggrieved, for damages; and every sheriff and his deputies, and every constable shall execute all writs and other process to him legally issued and directed from a justice's court and make due return thereof, under penalty of forfeiting one hundred dollars for each neglect or refusal, where such process shall be delivered to him ten days before the return day thereof, to be paid to the party aggrieved by order of the said court, upon motion and proof of such delivery, unless such sheriff or constable can show sufficient cause to the court at a day within three months from the date of the entry of the judgment nisi, of which the said officer shall be duly notified.

Code, s. 2079; 1899, c. 25; R. C., c. 105, s. 17; 1777, c. 218, s. 5; 1821, c. 1110; 1874-5, c. 33.

2825. Summons, orders and judgments, how executed. Whenever the sheriff may be required to serve or execute any summons, order or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and this chapter relating to sheriffs shall apply to coroners when the sheriff is a party. Sheriffs and coroners may return process by mail. Their liabilities in respect to the execution of process shall be as prescribed by law.

Code, s. 598; C. C. P., s. 354.

2826. Outgoing sheriffs not executing process. penalty. Any sheriff who shall have received a precept, and shall go out of office before the return day thereof, without having executed the same, shall forfeit and pay to the party at whose instance it was issued the sum of one hundred dollars, if such precept shall have remained in his hands for such length of time wherein it might have been well executed by him; unless the same shall have been thereafter executed by the successor of such sheriff, and returned at the day and place commanded therein; or unless it shall have been delivered over to the succeeding sheriff time enough to have allowed of its being executed by him; and the penalty aforesaid shall be recoverable by notice against such outgoing sheriff and his sureties.

Code, s. 2088; R. C., c. 105, s. 25.

2827. Pay money to plaintiff, or into clerk's office. In all cases where a sheriff has collected money upon an execution placed in his

hands, if there be no bona fide contest over the application thereof, he shall immediately pay the same to the plaintiff, or into the office of the clerk of the court from which the execution issued, and upon his failure to make such payment upon demand, he shall be liable to a penalty of one hundred dollars, to be collected as other penalties.

Code, s. 2080.

2828. Solicitor to prosecute officer for escape. It shall be the duty of solicitors; when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offense against the state, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, constable or jailer, to take the necessary measures to prosecute such sheriff, or other officer so offending.

Code, s. 1023; R. C., c. 34, s. 36; 1791, c. 343, s. 2.

2829. Not to allow escape. When any sheriff shall take or receive and have in keeping the body of any debtor in execution, or upon attachment for not performing a judgment for the payment of any sum of money, and shall wilfully or negligently suffer such debtor to escape, the person suing out such execution or attachment, his executors, or administrators, shall have and maintain an action for the debt against such sheriff and the sureties on his official bond, and in case of his death, against his executors or administrators, for the recovery of all such sums of money as are mentioned in the said execution or attachment, and damages for detaining the same.

Code, s. 2083; R. C., c. 105, s. 20; 13 Edw. I., c. 11; 1777, c. 118, ss. 10, 11.

2830. Have custody of jail. The sheriff shall have the care and custody of the jail in his county; and shall be, or appoint, the keeper thereof.

Code, s. 2085; R. C., c. 105, s. 22.

2830a. Prevent jail breaking for lynching. When the sheriff of any county has good reason to believe that the jail of his county is in danger of being broken or entered for the purpose of killing or injuring a prisoner placed by the law in his custody, it shall be his duty at once to call on the commissioners of the county, or some one of them, for a sufficient guard for the jail, and in such case, if the commissioner or commissioners fail to authorize the employment of necessary guards to protect the jail, and by reason of such failure the jail is entered and a prisoner killed, the county wherein whose jail the prisoner is confined shall be responsible in damages, to be recovered by the personal representatives of the prisoner thus killed, by action begun and prosecuted before the superior court of any county in this state.

2831. Publish list of delinquent taxpayers. Whenever any sheriff or tax-collector shall be credited on settlement with any tax or taxes, by him returned as insolvent, dead or removed, he shall forthwith make publication at the courthouse door, and at least one public place in each and every township in his county, of a complete list of the names of such insolvent, dead or removed delinquents, with the amount of the tax due from each, and the sum total so credited. Such list, by order of the board of commissioners, may also be published in any newspaper printed in the county; in which case, the expense of the advertisement, for such time as may be directed, shall be paid by the county.

Code, s. 2092; 1876-7, c. 78, ss. 1, 2, 3.

2832. Furnish list of liquor dealers to grand jury. The sheriff shall lay before the grand jury of his county, at each court, as soon as the grand jury shall be assembled, a list of all persons who may have obtained license to retail spirituous liquors by small measure, within two years previous to said court; which list the foreman of the grand jury, at the close of its session, shall deliver to the clerk for safe-keeping; and any sheriff failing to perform the duty aforesaid shall forfeit and pay to the state ten dollars, to be recovered by the prosecuting officer, in the same manner as the penalties against sheriffs for not returning process.

Code, s. 2087; R. C., c. 105, s. 24; 1825, c. 1272, s. 4; 1850, c. 185.

2833. Not to farm office. No sheriff shall let to farm in any manner, his county, or any part of it, under pain of forfeiting five hundred dollars, one-half to the use of the county, and the other half to the person suing for the same.

Code, s. 2084; R. C., c. 105, s. 21; 23 Hen. VI., c. 10.

NOTE. Action against, barred by statute of limitations, see Civil Procedure.

When judge absent, adjourn court from day to day, see Courts—Superior.

Allowed pay for keeping horses, see Civil Procedure.

Laying off homestead, see Civil Procedure.

Bail liable to, when, see Civil Procedure.

Bond when acting as county treasurer, see County Treasurer.

Duty in claim and delivery, see Civil Procedure.

Duty in attachment, see Civil Procedure.

Day of receipt of process endorsed thereon, see Criminal Procedure.

Deeds made by whom after expiration of office or death of sheriff, see Conveyances.

Duties in regard to prisoners in workhouse, see County Prison.

To execute writs for board of internal improvements, see Internal Improvements.

Failure to execute process a misdemeanor, Crimes.

Penalty for failure to return writ of habeas corpus, see Habeas Corpus.

Service of process from adjoining county, see —.

Releasing prisoner without bail, see Criminal Procedure.

Sales under execution, see Civil Procedure.

Tax collector for county, see County Revenue.

CHAPTER 71.

STATUTES, CONSTRUCTION OF.

(Sections 2837—2839.)

2837. Repeal of statute not to affect actions. The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute.

Code, s. 3764; R. C., c. 108, s. 1; 1830, c. 4; 1879, c. 163; 1881, c. 48.

2838. Rules for construction of statutes. In the construction of all statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the same statute, that is to say:

R. C., c. 108, s. 2.

1. SINGULAR AND PLURAL NUMBER, MASCULINE GENDER, ETC.

Every word, importing the singular number only, shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only, shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only, shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

2. AUTHORITY OF PUBLIC OFFICERS, ETC., EXERCISED BY MAJORITIES, UNLESS, ETC.

All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

3. "MONTH" AND "YEAR."

The word "month" shall be construed to mean a calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord."

4. LEAP-YEAR, HOW COUNTED.

In every leap-year, the increasing day and the day before, in all legal proceedings, shall be counted as one day.

R. C., c. 31; 21 Hen. III.

5. "OATH" AND "SWORN."

The word "oath" shall be construed to include "affirmation," in all cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirm."

6. "PERSON" AND "PROPERTY."

The word "person" shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary. The words "real property" shall be coextensive with lands, tenements and hereditaments. The words "personal property" shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendible to the heirs at law. The word "property" shall include all property, both real and personal.

7. "PRECEDING" AND "FOLLOWING."

The words "preceding" and "following," when used by way of reference to any section of these Revised Statutes, shall be construed to mean the section next preceding or next following that in which such reference is made; unless when some other section is expressly designated in such reference.

8. "SEAL."

In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto.

9. "WILL."

The term "will" shall be construed to include codicils as well as wills.

10. "WRITTEN" AND "IN WRITING."

The words "written" and "in writing," may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

11. "STATE" AND "UNITED STATES."

The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so-called; and the words

"United States" shall be construed to include the said district and territories and all dependencies.

12. "IMPRISONMENT FOR ONE MONTH," HOW CONSTRUED.

The words "imprisonment for one month," wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

Code, s. 3765.

2839. Where amended, how construed. Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment.

Code, s. 3766; 1868-9, c. 270, s. 22; 1870-1, c. 111.

CHAPTER 72.

STRAYS.

(Sections 2840—2842.)

2840. Owner notified; if unknown, register of deeds notified.

Any person who shall take up any stray horse, mare, colt, mule, ass or jennet, neat cattle, hog or sheep, shall within ten days after taking up such stray inform the owner, if to him known, if not, he shall inform the register of deeds of the supposed age, marks, brands and color of the stray, and that the same was taken up at his plantation or place of abode; whereupon the register of deeds shall record such information in a book kept by him for that purpose, for which service the taker-up of said stray or strays shall pay a fee of twenty-five cents, except for hogs and sheep, for which the fee shall be ten cents. The register of deeds shall at once publish a notice of the taking up of such stray, by posting the same at the courthouse door, and if the cost does not exceed two dollars, then in some newspaper published in the county. Such notices shall be published for thirty days, and shall contain a full and complete description of said stray and of all marks or brands on the same, and when and where the same was taken up. The fees for publishing such notices shall be paid by the party taking up the stray.

Code, s. 3768; 1874-5, c. 258, s. 2.

2841. Owner may reclaim. When any stray has been taken up, the owner may at any time before a sale reclaim such stray by proving his ownership and paying to the party capturing the same the actual costs paid the register of deeds as provided in the preceding section, together with the actual costs of keeping such stray, as fixed by the county commissioners. The board of commissioners of the several counties shall fix a scale of costs for keeping strays.

2842. When and how strays sold. If the owner of any stray shall fail to claim the same within thirty days after the publication of the notice required by law, the person taking up the stray shall cause the stray to be appraised by the nearest magistrate and two freeholders, none of whom shall receive any fees for such services. Such appraisement shall give a full and accurate description of such stray and shall by the magistrate be returned to the register of deeds, and by him recorded in his book for strays; and the register of deeds shall issue an order to the sheriff directing him to sell such stray and the sheriff shall sell such stray at public auction after ten days public advertisement as for sales of personal property under execution; and out of the proceeds he shall pay the cost of publishing the notices as to strays, the costs of keeping and the costs of sale, and shall pay the surplus to the county treasurer for the benefit of the public school fund of the county. The county board of education shall, at any time within twelve months after such funds have been paid to the county treasurer, upon due proof of ownership, issue an order commanding the county treasurer to pay to the owner of the stray the net amount paid the county treasurer as the proceeds of the sale of the stray.

CHAPTER 73.

SUNDAY AND HOLIDAYS.

(Sections 2843—2846.)

2843. Work in ordinary calling on Sunday forbidden. On the Lord's day, commonly called Sunday, no tradesman, artificer, planter, laborer, or other person, shall, upon land or water, do or exercise any labor, business or work, of his ordinary calling, works of necessity and charity alone excepted, nor employ himself in hunting, fishing or fowling, nor use any game, sport or play, upon pain that every

person so offending, being of the age of fourteen years and upwards, shall forfeit and pay one dollar.

Code, s. 3782; R. C., c. 115; 1741, c. 30, s. 2.

2844. What process executed on Sunday. It shall not be lawful for any sheriff, constable, or other officer to execute any summons, capias, or other process on Sunday, unless the same be issued for treason, felony or misdemeanor.

Code, s. 928; R. C., c. 31, s. 54; 1777, c. 118, s. 6.

2845. Dates of public holidays. The first day of January, the nineteenth day of January, the twenty-second day of February, the tenth day of May, the twentieth day of May, the fourth day of July, the first Monday in September, the day appointed by the governor as a thanksgiving day, and the twenty-fifth day of December of each and every year, are declared to be public holidays; and whenever any such holiday shall fall upon Sunday, the Monday following shall be a public holiday.

Code, s. 3784; 1891, c. 58; 1899, c. 410; 1901, c. 25; 1881, c. 294.

2846. Acts to be done on Sunday or holiday. Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or on a holiday the act may be done on the next succeeding secular or business day.

Code, ss. 3784, 3785, 3786; 1899, c. 733, s. 194.

CHAPTER 74.

SURETY.

(Sections 2847—2855.)

2847. Suretyship shown, what judgment and execution to contain. In the trial of actions upon contracts, either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the justice of the peace in his judgment, shall distinguish the principal and surety, which shall be indorsed on the execution by the clerk, or justice of the peace issuing it.

Code, s. 2100; R. C., c. 31, s. 124; 1826, c. 31, s. 1.

2848. Property of principal sold before that of surety. When an execution, indorsed as aforesaid, shall come to the hands of any officer for collection, he shall levy on all the property of the principal, or so much thereof as shall be necessary to satisfy the execution, and for want of sufficient property of the principal, also on the property of the surety, and make sale of all the property of the principal levied on before that of the surety.

Code, s. 2101; R. C., c. 31, s. 125; 1826, c. 31, s. 2.

2849. Summary remedy for and against principal. Any person, who may have paid money for and on account of those for whom he became surety, upon producing to the superior court, or any justice of the peace having jurisdiction of the same, a receipt, and showing that an execution has issued, and he has satisfied the same, and making it appear by sufficient testimony, that he has laid out and expended any sum of money, as the surety of such person, may move the court or justice of the peace, as the case may be, for judgment against his principal, for the amount which he has actually paid; a citation having previously issued against the principal to show cause why execution should not be awarded; and should not the principal show sufficient cause, the court or justice shall award execution against the estate of the principal.

Code, s. 2093; R. C., c. 110, s. 1; 1797, c. 487, s. 1.

2850. Surety paying debt of deceased principal, subrogated to creditors' rights. Whenever a surety, or his representative, shall pay the debt of his deceased principal, the claim thus accruing shall have such priority in the administration of the assets of the principal as had the debt before its payment.

Code, s. 2096; R. C., c. 110, s. 4; 1829, c. 23.

2851. Co-surety liable for contribution. Where there are two or more sureties for the performance of a contract, and one or more of them may have been compelled to perform and satisfy the same, or any part thereof, and the principal shall be insolvent, or out of the state, such surety may have and maintain an action against every other surety, for a just and ratable proportion of the sum which may have been paid as aforesaid, whether of principal, interest or cost.

Code, s. 2094; R. C., c. 110, s. 2; 1807, c. 722.

2852. May dissent from stay of execution; not then liable to surety on stay. Whenever any judgment shall be obtained before a justice, against a principal and his surety, and the principal debtor shall desire to stay the execution thereon, but the surety is unwilling that such stay shall be had, the surety may cause his dissent thereto

to be entered by the justice, which shall absolve him from all liability to the surety who may stay the same. And the constable or other officer, who may have the collection of the debt, shall make the money out of the property of the principal debtor, and that of the surety for the stay of execution, if he can, before he shall sell the property of the surety before judgment.

Code, s. 2095; R. C., c. 110, s. 3; 1829, c. 6, ss. 1, 2.

2853. May notify creditor to collect; penalty for delay. In all cases where any surety or indorser on any note, bill, bond, or other written obligation, shall consider himself in danger of loss in consequence of his contingent liability, either from the insolvency or misconduct of the principal, in said note, bill, bond, or other written obligation, or from the negligence of the payee or holder of any such instrument, it shall be lawful for such surety or indorser, at any time after such note, bill, bond, or other written obligation shall have become due and payable, to cause written notice to be given to the payee or holder of any such paper or obligation, requiring him to bring suit on said obligation, and to use all reasonable diligence to save harmless such surety or indorser: Provided, nothing herein contained shall apply to official bonds, or bonds given by any person acting in a fiduciary capacity.

Code, s. 2097; 1868-9, c. 232, s. 1.

2854. Negligence of creditor discharges surety, when; proviso. Should the payee or holder of any such note, bond, bill, or other written obligation, refuse or fail, within thirty days from the service of said notice, to bring suit in the appropriate court in an effort to save harmless such surety or indorser, such refusal or failure to sue shall operate as a discharge of such surety or indorser, from all liability whatever, on any such note, bond, bill, or other written obligation: Provided, that this notice shall not have the effect to discharge from liability any co-surety who does not join in such notice, or who has not given a separate notice: Provided further, that this and the preceding section shall not apply to holders of such note, bond, bill, or obligation, who hold the same as collateral security or in trust.

^{1/2} s. 2098; 1868-9, c. 232, s. 2.

2855. How notice served. Such notice shall be served by the sheriff or his deputy, who shall return it to the party for whose benefit the notice was issued, which shall be evidence of the fact in all courts.

Code, s. 2099; 1868-9, c. 232, s. 3.

NOTE. For remedy of surety on executor's bond, see Administration. For evidence against principal as against surety, see s. 251a.

CHAPTER 75.

TAXES, COLLECTION OF.

| | Sections. |
|----------------------------------|-----------|
| I. General provisions, | 2856—2865 |
| II. Life tenants and co-tenants, | 2866—2867 |
| III. Infants and lunatics, | 2868—2869 |
| IV. Lien of taxes, | 2870—2873 |
| V. Sheriff's powers and duties, | 2874—2884 |
| VI. Sale of personalty, | 2885—2887 |
| VII. Sale of realty, | 2888—2899 |
| VIII. Certificate of sale, | 2900—2903 |
| IX. Deeds under tax sale, | 2904—2910 |
| X. Purchasers at tax sale, | 2911—2913 |
| XI. Redemption, | 2914—2915 |

I. GENERAL PROVISIONS.

2856. Chapter to remain in force unless expressly repealed or amended by, or clearly in conflict with, later acts. The provisions of this chapter shall continue in force whether or not brought forward in subsequent acts to raise revenue or acts to provide for the assessment and collection of taxes, commonly called "revenue acts" and "machinery acts," unless and until expressly repealed or amended by, or clearly inconsistent with, subsequent legislation; it being the intention of the general assembly that this chapter shall be a standing provision for the government of the matters embraced therein, and not to be repealed by implication because omitted in whole or in part from subsequent legislation on the subject of taxation.

2857. Application and construction of this chapter. The provisions of this chapter shall apply to all taxes as defined in this chapter, whether state, county, town, city, or other municipal subdivision; and shall be liberally construed in favor of, and in furtherance of, the collection of such taxes.

2858. Definitions. Unless such construction or definition would be manifestly inconsistent with or repugnant to the context, the words and phrases following, whenever used in this chapter, shall be construed to include in their meaning the definitions set opposite the same in this section:

1. "Tax," "taxes." Any taxes, special assessments or costs, interest or penalty imposed upon property or polls.

2. "He." Male, female, company, corporation, firm, society, singular or plural number.

3. "Real property." Real estate, land, tract, lot—not only the land itself, whether laid out in town or city lots or otherwise with all things therein, but also all buildings, structures and improvements and other permanent fixtures of whatever kind thereon, and all rights and privileges belonging or in anywise appertaining thereto, and all estates therein.

4. "Sheriff." Every person who is by law authorized to collect taxes, either state or municipal.

1903, c. 251, s. 86.

2859. When taxes are due. Unless otherwise expressly provided by law, all taxes shall be due on the first Monday in September of each year and collection thereof may be enforced on and after that day.

1903, c. 251, s. 79.

2860. Payable in national currency. Taxes are payable in the existing national currency, and shall be collected as prescribed by this chapter, except where otherwise provided by law.

Code, s. 3674; 1872-3, c. 144, s. 1; 1903, c. 247, s. 1.

2861. No taxes to be released; penalty. No board of county commissioners, or council, or board of aldermen or commissioners of any city or town shall have power to release, discharge, remit or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions for any reason whatever; and any tax so discharged, released, remitted or commuted, may be recovered by civil action from the members of any such board at the suit of any citizen of the county, city or town, as the case may be, and when collected shall be paid to the proper treasurer. Nothing in this section shall be construed to prevent the proper authorities from refunding taxes as provided in this chapter; nor to interfere with the powers of any officers or boards sitting as a board of equalization of taxes; nor construed to exempt any taxpayer or property from liability for taxes released, discharged, remitted or commuted in violation of this section.

1901, c. 558, s. 31.

2862. Injunction and replevin not allowed; remedy of taxpayer. Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce

payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer.

1901, c. 558, s. 30.

Note. See also s. 776.

2863. How tax list endorsed; equivalent to judgment and execution. Every tax list before being placed in the hands of the sheriff shall be endorsed by the authorities levying the taxes, with an order for their collection. The order shall be in the following or similar form:

State of North Carolina, County.

Office of Board of Commissioners of County (or town).

To the Sheriff (or Constable) of County (or town)—Greeting:

By order of the board, you are hereby commanded to collect the taxes herein mentioned, according to the provisions and requirements of the existing law.

In witness whereof, I have hereunto set my hand and official seal, this the day of, 19.....

[L. S.] Clerk Board of Commissioners of County.

The tax list, when thus endorsed, shall have the force and effect of a duly docketed judgment and of an execution against the real and personal property of the persons charged with taxes on such list.

Code, s. 3681; 1903, c. 251, s. 74; 1872-3, c. 115, s. 21; 1876-7, c. 155, s. 22.

2864. Taxes to be paid in cases of judicial sales and sales under powers. In all civil actions and special proceedings wherein the sale of any real estate shall be ordered, the judgment shall provide for the payment of all taxes then assessed upon the property and remaining unpaid, and for the payment of such sums as may be

required to redeem the property, if it has been sold for taxes and such redemption can be had; all of which payments shall be adjudged to be made out of the proceeds of sale. The judgment shall adjust the disbursements for such taxes and expenses of redemption from tax sales between the parties to the action or proceeding in accordance with their respective rights. And whenever any real estate shall be sold by any person under any power of sale conferred upon him by any deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors, the person making such sale must pay out of the proceeds of sale all taxes then assessed upon such real estate and such sums as shall be necessary to redeem the land, if it has been sold for taxes and such redemption is practicable.

1901, c. 558, s. 47.

2865. Lienor may pay taxes and retain lien of. Any person having a lien or incumbrance of any kind upon real estate may pay the taxes due by the owner thereof in so far as the same are a lien upon such real estate, and the amount of taxes so paid shall, from the time of payment, operate as a lien upon such real estate in preference to all other liens, which lien may be enforced by action in the superior court in term. The money so paid may also be recovered by action for moneys paid to his use against the person legally liable for the payment of such taxes.

Code, s. 3700; 1901, c. 558, s. 46; 1879, c. 71, s. 55.

II. LIFE TENANTS AND CO-TENANTS.

2866. Life tenant failing to pay taxes forfeits estate and liable for damages. Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life. If any tenant for life of personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner.

Code, ss. 3698, 3699; 1901, c. 558, s. 45; 1879, c. 71, ss. 53, 54.

2867. Co-tenant or joint owner may pay total tax or his share; may redeem; remedies for expenditures in excess of his share.

Any one of several tenants in common, or joint tenants or copartners shall have the right to pay his share of the taxes assessed or due upon the real estate held jointly or in common, or, if such estate has been sold for taxes, he may redeem his share by paying his proportionate part of the amount required for redeeming the whole. Where he has paid his share of the taxes or amount required for redemption and the land has been or shall be divided by actual partition the share set apart to him in severalty shall be free from the lien of, and shall not be liable to be subjected in any manner to, the payment of the residue of taxes assessed upon such property; but such residue of taxes and the costs and penalties incident thereto shall be a lien upon the residue of such real estate, which residue shall be subjected to the satisfaction thereof; and when he has paid his share of the taxes, or amount necessary to redeem, and the real estate is sold under judicial proceedings for partition, his share of the proceeds shall not be diminished by disbursements for the residue of such taxes or for redeeming the property, and the costs and penalties incident thereto. Any such part owner in real estate shall have the right to pay the whole of the taxes assessed thereon and all costs and penalties incident to such taxes, and to redeem such real estate as a whole when it has been sold for taxes, and all sums by him so paid in excess of his share of such taxes, costs and penalties and amounts required for redemption, shall constitute a lien upon the shares of his co-tenants or associates, payment whereof, with interest, he may enforce in proceedings for partition, actual or by sale, or in any other appropriate judicial proceeding. When one tenant in common, joint tenant or copartner shall have paid his proportionate part of the taxes, as allowed by this section, before a sale for taxes, the sheriff shall except his undivided interest from the sale and in the certificate of sale and deed for the property.

1901, c. 558, ss. 13, 14, 47.

III. INFANTS AND LUNATICS.

2868. Minors and persons non compos, lands of, not to be sold, personalty may be. The lands of a minor, lunatic or other person non compos mentis, shall in no case be liable to be sold for taxes, but the personal property of such persons may be levied upon and sold for all taxes due upon the estates of such persons; and their real estate shall be and remain subject to a lien for all such taxes, with interest thereon at six per centum per annum, from the time such taxes fall due until paid.

Code, s. 3691.

2869. Guardians and other fiduciaries must pay taxes. It shall be the duty of every guardian, executor, administrator with the will annexed, agent, trustee, receiver or other fiduciary in whose care or control any property or estate, real or personal, may be, to pay the taxes thereon out of the trust funds in his hands, if any there be; and if he fail so to do he shall become personally liable for such taxes and such liability may be enforced by an action against him in the name of the sheriff. If he permit such property to be sold by reason of his negligence to pay the taxes when he has funds in hand, he shall be liable to his ward, principal, or cestui que trust for all actual damages incident to such neglect. This section shall not have the effect of relieving the estates held in trust or under the control of fiduciaries from the lien of such taxes.

Code, ss. 3698, 1595; 1879, c. 71, s. 53; R. C., c. 54, s. 27; 1868-9, c. 201, s. 32; 1762, c. 69, s. 14.

IV. LIEN OF TAXES.

2870. Personal property. Taxes shall not be a lien upon personal property, except where otherwise provided by law, but from a levy thereon.

Code, s. 3682.

2871. Real estate. The lien of the state, county and municipal taxes levied for any and all purposes in each year shall attach to all real estate of the taxpayer situated within the county or other municipality by which the tax list is placed in the sheriff's hands, which lien shall attach on the first day of June annually, and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid.

Code, s. 3682; 1879, c. 71, s. 26.

2872. Railroad property. The taxes upon the property of any and all railroads, road beds, rights of way, depots and side-tracks, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereon, commencing from the first day of June in each current year, and shall have priority over all claims or demands whatsoever of all persons or bodies corporate, except the United States and this state; and the above described property, or any part thereof, may be taken and held for payment of all taxes assessed against such railroad company in the several counties in this state.

1903, c. 251, s. 88.

2873. Tax lien foreclosed by action; parties to. A lien upon real estate for taxes or assessments due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, in which action the court shall order a sale of such real estate, or so

much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due on such lien, together with interest, penalties and costs allowed by law, and the costs of such action. When such lien is in favor of the state or county, or both, such action shall be prosecuted by and in the name of the county; when the lien is in favor of any other municipal corporation the action shall be prosecuted by and in the name of such corporation. When such lien is in favor of any private individual or private corporation holding a certificate of tax sale or deed under a tax sale, whether as original purchaser at a tax sale or as assignee of the county or other municipal corporation or of any other holder thereof, such action shall be prosecuted in the name of the real party in interest.

1901, c. 558, ss. 42, 43.

V. SHERIFF'S POWERS AND DUTIES.

2874. Sheriff's duties. Whenever any taxes shall be due and unpaid, the sheriff, who by law is required to collect the same, shall immediately proceed to collect them as prescribed by this chapter.

Code, s. 3686; 1872-3. c. 115, s. 28.

2875. Sureties of sheriff may collect, when; their liabilities. If any sheriff shall die during the time appointed for collecting taxes, his sureties on his tax bond may collect them, and for that purpose shall have all power and means for collecting the same from the deputies and taxpayers as the sheriff would have had, and shall be subject to all the liabilities of the sheriff for collecting and settling the taxes; and the state and municipal authorities shall have the same remedies against such sureties as might have been had against the sheriff and his bondsmen, if he had lived.

1903, c. 251, s. 102.

2876. Time limited for collection of taxes. The sheriff and, in case of his death, the sureties on his tax bond, shall have one year and no longer from the day prescribed for his settlement and payment of the state taxes within which to finish the collection of all taxes; but the extension of time for collection shall not extend the time of his settlement of the taxes.

1903, c. 251, s. 103.

2877. Attendance in townships to collect taxes; notice. Except where otherwise provided by law the sheriff or his deputy shall attend at the courthouse or his office in the county town during the months of September and November for the purpose of receiving taxes. He shall also in like manner attend at least one day

during the month of October at some one or more places in each township, of which fifteen days' notice shall be given by advertisement at three or more public places and in a newspaper, if one be published in the county; but nothing in this section shall be construed to prevent the sheriff from levying upon and selling personal property at any time after the tax lists are placed in his hands, if he shall believe the taxpayer is preparing to leave the county or state.

1903, c. 251, s. 80.

2878. Process to another county to enforce payment of taxes.

If any person liable for taxes has no property in the county in which such taxes are due, but has property in any other county, the sheriff may make and certify under his hand an abstract of the taxes due by such person, as shown by the tax lists in his hands, and forward the same to the sheriff of any county in which property of such taxpayer may be found, with directions to collect such taxes. Such abstract shall have the force and effect of a tax list in any county to which it is sent, and the sheriff to whom it is sent shall collect the taxes in the same manner as he collects taxes appearing on the regular tax list of his county, and shall pay over to the sheriff from whom he receives such abstract the amount collected, less his lawful commissions. He shall make return of his proceedings under such abstract within thirty days after its receipt. Such abstract or a copy or duplicate thereof may be sent for collection to the same or some other county until the amount due shall be collected.

Code, s. 3692; 1872-3, c. 115, s. 28.

2879. License taxes, levy and sale to collect. Upon failure of any person to pay any of the license taxes imposed by law, when due, the sheriff shall have the same powers to levy upon and sell any personal or real estate owned by such person, as is provided in other cases for the collection of taxes.

1903, c. 247, s. 87.

2880. To prosecute delinquents for license taxes. It shall be the duty of the sheriff of each county to make diligent inquiry as to whether or not all license taxes provided for by law shall have been paid and, upon the failure of any person to pay on demand any license tax for which he is liable to swear out a warrant before some justice of the peace in such county, and the procedure thereon shall be as in other criminal actions: Provided, the payment of the tax and all costs accrued at any stage of the action shall be a bar to further prosecution.

1903, c. 247, s. 87.

2881. Property in hands of receiver. Whenever taxes are duly assessed against any corporation having chartered rights, or doing business in this state, or having property in this state, or against any person resident in this state or doing business, or having property in this state, and the tax list is in the hands of the sheriff, it shall be competent for such sheriff whenever such taxes, whether listed or unlisted, are due and unpaid, to levy upon and sell such part of the property, real and personal, belonging to such person or corporation as may be necessary to pay such taxes listed or unlisted, whether the property of such corporation or person be in the hands of a receiver duly appointed or not; and in such cases it shall not be necessary for such officer to apply to and obtain from the court appointing such receiver, or having jurisdiction of the property or of the receiver, an order for the payment of such taxes, but the same may be collected as if the property was not in the hands of a receiver or in the custody of the law. The powers conferred by this section upon the sheriff shall not have the effect to relieve the receiver from his duties and liabilities to pay taxes as provided elsewhere in this chapter.

Code, ss. 699, 700; 1879, c. 2451, ss. 1-4.

2882. Garnishee and attachment proceedings. If any poll tax or other tax shall not be paid within sixty days after the same shall be demandable, it shall be the duty of the sheriff, if he can find no property of the person liable sufficient to satisfy the same, to attach any debt or other property incapable of manual delivery, due or belonging to the person liable, or that may become due before the expiration of the calendar year, and the person owing such debt or having such property in possession shall be liable for such tax. It shall be the duty of every person, on demand or request made, to give to the sheriff a list giving the names of all persons employed by him who are liable for tax. For the purpose of carrying into effect the provisions of this section, the following form shall be used as an attachment, viz:

To, A. B.: Take notice, that this is to attach any debt that is now due or may become due to C. D., a delinquent in his poll (or property) tax for the year of nineteen hundred and, and you are hereby summoned to appear before E. F., an acting justice of the peace for county, and disclose any indebtedness which is or may be due said delinquent by you during the present calendar year, and to show cause why judgment should not be rendered against you for said delinquent tax and costs of this proceeding. day of 190..

....., E. F., Justice of the Peace.

For serving notice the sheriff shall receive twenty-five cents, and if judgment is rendered, the justice shall receive twenty-five cents as costs. The justice shall hear and determine the matter as in other civil actions, and, if he find that the garnishee owes the delin-

quent any sum due or to become due during the calendar year, or has property or effects belonging to such delinquent, he shall give judgment against the garnishee for the taxes due by the delinquent and for costs, or for so much of such taxes and costs as the facts will warrant. If the amount of the tax be beyond the jurisdiction of the court of a justice of the peace, the sheriff may proceed by action and attachment in the superior court. All actions and proceedings instituted under this section shall be in the name of the sheriff. In no case shall the garnishee be adjudged to pay a greater sum than his indebtedness to the taxpayer or the value of the property of such taxpayer in his hands or under his control.

Code, s. 3675; 1872-3, c. 144, s. 2; 1881, c. 116, ss. 2, 3; 1903, c. 251, s. 11.

2883. Corporation failing to pay taxes; garnishment; penalty.

Whenever any corporation doing business in this state shall be delinquent in the payment of any taxes assessed or charged against it, the sheriff may notify any agent or officer of such corporation, or any person indebted thereto, of the amount of taxes due and unpaid by such corporation, and thereupon such agent, officer or debtor shall pay to such sheriff or tax collector the amount he has in hand for, or of his indebtedness to, such corporation, or so much thereof as will satisfy such taxes and costs. The amount so paid shall be a discharge pro tanto of such agent, or officer, or debtor from his liability to such corporation. Any such agent, officer or debtor who shall fail to pay over to the sheriff as required by this section shall be liable for such money in civil action to be brought by such sheriff in his name and official capacity; and such officer or agent of such corporation shall also be liable to criminal prosecution as is provided in the chapter on crimes. If any corporation be delinquent for six months in the payment of the taxes lawfully assessed and charged upon or against it or its property, its charter shall be forfeited and a receiver shall be appointed to wind up its affairs in an action to be prosecuted by the attorney-general in the name of the state.

1901, c. 538, s. 29.

Note. See Crimes.

2884. Fees of sheriff and expenses of sale, etc. The sheriff shall be entitled to fifty cents for each actual levy and sale of personalty and fifteen cents for each advertisement of such sale, but in no case shall such sums be collected where no levy or sale or advertisement is made. For advertising lands for sale for taxes, twenty cents for each parcel advertised. For making each certificate of the sale and purchase of real estate, and for each deed for real estate, fifty cents. For entering memorandum of redemption on sale book, twenty-five cents. The county commissioners shall allow him in

settlement such other sums as he has actually expended which were necessary for the due execution of his duties under this chapter.

1903, c. 251, ss. 80, 97; 1901, c. 558, ss. 10, 11.

VI. SALE OF PERSONALTY.

2885. To be first exhausted. The personal property of a taxpayer shall be levied upon and shall be sold for the satisfaction of his taxes before resorting to his real estate, if sufficient personalty subject to levy and sale can be found in the county of the sheriff having the tax list in hand. Upon the service of the notice required by this chapter, that his real estate is to be sold for taxes, it shall be incumbent upon the taxpayer to point out to the sheriff personalty out of which the taxes may be made or else such taxpayer shall forfeit his rights under this section.

Code, s. 3688; 1903, c. 558, s. 1 (1).

2886. As under execution. The seizure and sale of personal property for taxes shall be governed by the laws regulating levy and sale under execution.

Code, s. 3688; 1903, c. 558, s. 1 (1).

2887. What subject to. All the personal property subject to taxation shall be liable to be seized and sold for taxes, and the personal property of any deceased person shall be liable in the hands of any executor or administrator for any tax due by any testator or intestate; and all transfers of personal property by any taxpayer, made after his taxes are due; by way of gift, or mortgage, or deed of trust, or of assignment for creditors, or bequest by will, or in any other way or for any other purpose than a bona fide sale for value, in the ordinary course of dealing, shall be null and void as to such taxes and shall have no effect upon the rights, powers and duties of the sheriff to levy upon and sell such property for such taxes: Provided, such levy be made within sixty days after such transfer.

Code, s. 3682.

VII. SALE OF REALTY.

2888. When liable to. If personal property of any taxpayer, sufficient for the satisfaction of his taxes and subject to levy, is not to be found in the county of the sheriff having the tax list in hand for collection, it shall be the duty of such sheriff to sell the real estate of such taxpayer, if delinquent in the payment of his taxes, under the directions set forth in this chapter.

Code, ss. 3688, 3691; 1903, c. 558, s. 1 (1).

2889. Time and place for. The sale of real estate for taxes shall, unless otherwise expressly provided by law, be made at the court-

house door of the county, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of the first Monday in May of each year, but, if necessary, the sale may be continued from day to day until all the property advertised shall be disposed of. If, for any reason, the sale is not made on the day prescribed, another day may be set by the county commissioners at a regular meeting, and the sale shall be had on such day after advertisement and notice as required by this chapter.

Code, s. 459; 1901, c. 558, s. 3.

2890. Notice to be given delinquent. In addition to the advertisement required by the next succeeding section, the sheriff shall, at least twenty days before a sale of real estate for taxes, serve upon each delinquent taxpayer whose real estate is advertised for sale, if such person can be found in the county, a copy of so much of such advertisement of sale as relates to him and his real estate. If such delinquent can not be found in the county, such notice shall be mailed to him, if his postoffice can be ascertained by the exercise of reasonable diligence, and personal service shall also be made upon his agent, if he have such agent in the county to the knowledge of the sheriff, or upon some person of suitable age and discretion in possession of or residing upon the land or some portion thereof.

Code, ss. 457, 3691; 1901, c. 558, s. 3.

2891. Advertisement. Before any real estate shall be sold for taxes the sheriff shall give public notice of the time, place and cause of such sale by advertisement at the courthouse door and in some newspaper published in the county, if any there be, for four successive weeks immediately preceding the day of sale. If there be no newspaper published in the county, such advertisement must be posted for four weeks at some public place in each township of the county, except that in which the courthouse is located, in addition to posting at the courthouse door. Such advertisement must contain a notice that all the lands whose owners are delinquent in payment of their taxes of the preceding year will be sold, and shall set out a list of the lands to be sold and the amount of taxes, expenses and costs due by each delinquent owner, giving his name.

Code, s. 3691; 1901, c. 558, s. 3.

2892. How made. All sales of real estate for taxes shall be at public outcry to the highest bidder. All the advertised real estate of each delinquent shall be sold at the same time as one body, and no bid therefor shall be received unless sufficient in amount to discharge all the taxes due by the delinquent, together with all costs and expenses of sale. If no such bid be received, the county, city or town, as the case may be, shall be deemed the purchaser and the

sheriff shall so record it on his sales book. If any bidder fail to pay the amount of his bid immediately upon his being declared the purchaser the sheriff may resell at once if he deem it proper to do so.

Code, ss. 3693, 3694; 1901, c. 558, ss. 37, 4.

2893. Sales book to be kept; copy filed with register of deeds; copy evidence of regularity, etc. The sheriff shall keep a sales book in which shall be entered and shown what real estate he sells for taxes, the name of the delinquent in whose name such real estate was listed, the amount of the taxes, costs and expenses for which it was sold and the name of the purchaser and amount of his bid, where there was a purchaser other than the county, city or town, as the case may be. If the county, city, or town become the purchaser under the provisions of law, he shall record the fact in such book. A copy of this book, certified by the sheriff, shall be filed with the clerk of the county commissioners, or the city or town authorities, as the case may be, within one year after the sale. Such certified copy shall be prima facie evidence of the truth of the matters therein contained, and of the regularity of the sales therein recorded. When the sheriff makes a deed to any land sold for taxes he shall make an entry to that effect in the sales book opposite the description of the land conveyed.

1901, c. 558, ss. 5, 10.

2894. Records sufficient proof of sale. The books and records belonging to the offices of the register or sheriff, or copies thereof properly certified, shall be deemed sufficient evidence to prove the sale of any real property for taxes, the redemption thereof or the payment of the taxes thereon.

1901, c. 558, s. 26.

2895. Listed in name of wrong person. No sale of real estate shall be void because such real estate was listed in the name of any other person than the rightful owner, if such real estate be in all other respects sufficiently described. But no sale of property so listed in the name of the wrong person shall be held valid where the rightful owner has listed the same and paid the taxes thereon.

1901, c. 558, s. 25.

2896. Irregularities immaterial. No irregularities in making assessments or in making the returns thereof in the equalization of property as provided by law, or in any other proceeding or requirement of law, shall invalidate the sale of any real estate when sold by the sheriff for delinquent taxes, nor in any manner invalidate the tax levied on any property or charged against any person.

1901, c. 558, s. 27.

2897. Irregularities defined. The following defects, omissions and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings, up to and including the execution and delivery of the deed for property sold for taxes, shall be taken and deemed to be mere irregularities within the meaning of the next preceding section: The failure of the assessors to take or subscribe an oath or attach one to an assessment roll; the omission of a dollar mark or other designation descriptive of the value of figures used to denote an amount assessed, levied or charged against any property or the valuation of any property upon any record; the failure to make or serve any notice mentioned in this chapter; the failure or neglect of the sheriff to offer any real estate for sale for delinquent taxes thereon at the time mentioned in the advertisement or notice of such sale; failure of the sheriff to adjourn such sale from day to day, or any irregularity or informality in such adjournment; any irregularity or informality in the manner or order in which real estate may be offered for sale; the failure to assess any property for taxes or to levy any tax within the time provided by law; any irregularity, informality or omission in any such assessment or levy; any defect in the description, upon any assessment book, tax list, sales book, or other record, of real or personal property assessed for taxation, or upon which any taxes are levied, or which may be sold for taxes; provided such description be sufficiently definite to enable the sheriff, or any person interested, to determine what property is meant or intended by the description, and in such case a defective or indefinite description, on any book, list or record, or in any notice or advertisement, may be made definite by the sheriff in the deed by which he may convey such property, if sold for taxes, by inserting in such deed a proper and definite description of the property so defectively or indefinitely described; any other irregularity, informality or omission or neglect on the part of any person or in any proceedings, whether mentioned in this section or not; the omission of a seal to the sheriff's deed; the neglect or omission to tax or assess for taxation any person or property; the overtaxation of persons or property liable to be taxed.

1901, c. 558, s. 28.

2898. De facto officers, acts of, valid. In all actions, proceedings and controversies involving the question of title to real property held under and by virtue of a sheriff's certificate of sale for taxes or tax deed; and acts of assessors, sheriffs, clerks, supervisors, commissioners and other officers de facto, shall be deemed and construed to be of the same validity as acts of officers de jure.

1901, c. 558, s. 24.

2899. Cancellation of void sales and deeds. Whenever it shall be made to appear to the satisfaction of the sheriff, either before the execution of a deed for real property sold for taxes, or upon the deed being returned by the purchaser, that any real estate was sold which was not subject to taxation or upon which the taxes had been paid previous to the sale, he shall make an entry opposite such tract or lot on the record of same that the same was erroneously sold, and such entry shall be evidence of the fact therein stated; and in such cases the purchase-money shall be refunded to the purchaser as provided by this chapter. If such deed has been registered, the sheriff may nullify the same by writing on the margin of the register's book, at the page on which said deed appears, that the same is cancelled pursuant to this section and for the causes herein set forth.

1901, c. 558, s. 22.

VIII. CERTIFICATE OF SALE.

2900. Sheriff issues to purchaser; form. The sheriff shall give to the purchaser of real estate sold for taxes a written certificate, under his official signature, to the effect and in the form following:

North Carolina, County.

I,, sheriff of the county of, do hereby certify that the following described real estate in said county and state, to-wit (describing the same and stating in whose name it was listed on the tax lists), was, on the day of, 190..., duly sold by me, in the manner provided by law, for the delinquent taxes of for the year 190..., amounting to dollars, including interest and penalty thereon and the cost allowed by law, when and where (name of the purchaser) purchased said real estate at the price of dollars, he being the highest and best bidder for the same. And I further certify that unless redemption is made of said estate in the manner provided by law, the said, his heirs or assigns, will be entitled to a deed in fee therefor on and after the day of, A. D. 190... on surrender of this certificate. In witness whereof, I have hereunto set my hand, this day of, A. D.

..... Sheriff.

1901, c. 558, s. 9.

2901. Separate certificates required, when. The real estate of each delinquent shall be inserted in a separate certificate notwithstanding the fact that the same person may have purchased the real estate of several delinquents. But this shall not apply to lands held in cotenancy or joint tenancy. Such lands may be inserted in one certificate, no matter how many delinquents may be interested therein.

1901, c. 558, s. 9.

2902. Certificate when county, city, etc., is purchaser; right of corporation to transfer. When the county or other municipal corporation becomes the purchaser, under the provisions of this

chapter, of any real estate sold for taxes, the sheriff shall issue a certificate of purchase in the name of such corporation substantially in the form provided by the next preceding section. Such certificates shall remain in the custody of the sheriff, and at any time the county commissioners may assign such certificates to any person wishing to buy, for the amount expressed on the face of the certificate and interest thereon at the rate per centum which the taxes were drawing at the time of the purchase, or for the total amount of all tax on such real estate. Such assignment may be made by the endorsement of the name of the county by the chairman of the board of county commissioners, and such endorsement shall be made when ordered by the county commissioners. The commissioners or other governing body of the municipal corporation other than a county shall have the same right of transfer as is above conferred, such transfer to be made by the mayor or treasurer of such corporation and in its name.

1901, c. 558, ss. 37, 39.

2903. Certificate presumptive evidence of validity. The sheriff's certificate of sale and purchase shall be presumptive evidence of the regularity of all prior proceedings incident to such sale and purchase and of the due performance of all things essential to the validity thereof.

1901, c. 558, s. 9.

IX. DEEDS UNDER TAX SALE.

2904. Notice of purchase, what to contain; how published; when and on whom served. No purchaser or assignee of such purchaser of any real estate, at any sale for taxes or special assessments due either to the state or any county or any incorporated town or city within the same, or at any sale for taxes authorized by the law of this state, shall be entitled to a deed for the real estate so purchased until the following conditions have been complied with, to-wit: Such purchaser or assignee shall serve or cause to be served a written or printed, or partly written and partly printed, notice of such purchase on every person in actual possession or occupancy of such land or lot, and also on the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he can be found in the county, at least three months before the expiration of the time of redemption, in which notice he shall state when he purchased the land or lot, a description thereof, in whose name it was taxed, for what year taxed or specially assessed, and when the time of redemption will expire. If no person is in actual possession or occupancy of such land or lot, and the person in whose name it was taxed or assessed can not upon diligent inquiry be found in the county, then

such person or his assignee shall publish such notice in some newspaper published in such county, and if no newspaper is published in the county, then the newspaper that is published in this state nearest the county-seat of the county in which such real estate is situated, which notice shall be inserted three times, the first not more than five months and the last time not less than three months before the time of redemption shall expire. The fee for such publication in a newspaper shall not exceed three dollars for each tract so advertised.

1901, c. 558, ss. 15, 17.

2905. Purchaser to make affidavit before receiving; what affidavit to contain. Every person who has purchased any land at a tax sale, or the assignee of such person, by himself or agent, before he shall be entitled to a deed for such land, shall make an affidavit of his having complied with the conditions of this chapter as to giving notice of such purchase, stating particularly the facts relied on as such compliance, which affidavit shall be presented to the person authorized by law to execute such tax deed, to be by such officer delivered to the register of deeds and entered on the record of his office and carefully preserved among the files of his office, which record or affidavit shall be *prima facie* evidence that such notice had been given. The register shall be entitled to the same fee therefor as is allowed by law for registering deeds.

1901, c. 558, s. 16.

2906. Deed when and by whom to be made. At any time after one year, and within two years, from the day of sale of any real estate for taxes and upon demand of the purchaser and his production of the certificate of such sale and purchase, the sheriff shall, if the real estate has not been previously redeemed, as allowed by law, execute a conveyance to the purchaser, his heirs or assigns, for the real estate described in the certificate. If the certificate be lost, such conveyance may be made by the sheriff upon his being satisfied of such loss. When the sheriff has made due sale of land for taxes and dies before executing a deed thereto, or when a sheriff dies, and, in collecting taxes due on lists that were in his hands for collection, his executor or administrator, or anyone acting for the sureties on his bond, shall have made sale for taxes as contemplated by law in all such cases, his successors in office shall execute a deed or conveyance to the person entitled to the same. If the county or other municipal corporation be the purchaser or holder of the certificate, the sheriff shall execute such deed upon demand of the county commissioners or governing board of such other municipal corporation.

1901, c. 558, s. 18.

Note. See also ss. 903, 904.

2907. Form. Deeds made by the sheriff for real estate sold for taxes shall be substantially in the following form:

North Carolina, County.

Whereas, at a sale of real estate for the nonpayment of taxes, made in the county of, on the day of, 190..., the following-described real estate which was listed in the name of, in township of said county, was sold, to-wit. (Here place description of real estate conveyed); and,

Whereas, The same not having been redeemed from such sale and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of North Carolina necessary to entitle (insert the name of grantee) to a deed of said real estate; now, therefore, I,, sheriff of said county of, in consideration of the premises and by virtue of the statutes of North Carolina in such cases provided, do hereby grant and convey unto in fee simple the said real estate hereinbefore described, subject, however, to any right of redemption provided by law.

Given under my hand and seal, this.... day of, A. D. 190...
, Sheriff. (Seal.)

1901, c. 558, s. 19.

2908. Separate deeds required, when. The real estate of each delinquent shall be conveyed by a separate deed, notwithstanding the fact that the same person may have purchased the real estate of several delinquents. This shall not apply to lands held in cotenancy or joint tenancy. Such lands may be conveyed by one and the same deed, no matter how many delinquents may be interested therein.

1901, c. 558, s. 10.

2909. Registration. All deeds made pursuant to this chapter by the sheriff shall be registered in the same manner as other conveyances of real estate, and shall vest in the grantee, his heirs and assigns, the title of the property therein described.

1901, c. 558, s. 19.

2910. Evidence of what. Deeds made by a sheriff for real estate sold for taxes shall be presumptive evidence in all courts of this state in all controversies, actions and proceedings in relation to the rights of the purchaser, his heirs or assigns, to the lands thereby conveyed, of the following facts:

1. That the real estate conveyed was subject to taxation for the year or years stated in the deed.

2. That the taxes were not paid at any time before the sale.

3. That the real property conveyed had not been redeemed from the sale at the date of the deed.

4. That the property had been listed and assessed.

5. That the taxes were levied according to law.

6. That the property was sold for taxes, as stated in the deed.

7. That all notices of such sale required to be served upon the delinquent or others had been duly served, and due advertisement of the sale had been made.

And such deeds shall be conclusive proof of the following facts:

1. That the manner in which the listing, assessment, levy and sale were conducted was in all respects as the law directed.

2. That the grantee named in the deed was the purchaser or his assignee.

3. That all the pre-requisites of the law were complied with by all the officers who had or whose duty it was to have had any part or action in any transaction relating to or affecting the title conveyed or purporting to be conveyed by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done, except in regard to the points named in this section, wherein the deed shall be presumptive evidence only.

And in all controversies, actions and proceedings involving the title of real property claimed and held under and by virtue of a deed made substantially as required by this chapter, the person claiming title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the title which such deed purports to convey, either that such real property was not subject to taxation for the year or years named in the deed or that the taxes had been paid before the sale, or that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of the persons having the right of redemption under the laws of this state, or that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property. No person shall be permitted to question the title acquired by a sheriff's deed made pursuant to this chapter without first showing that he or the person under whom he claims title had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title. But such deeds shall not pass title where the taxes for which the sale was had had been paid in full prior to such sale. And in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same, or in the purchaser, and, if such fraud is established, such sale and title shall be void.

1901, c. 558, s. 20.

X. PURCHASERS AT TAX SALE.

2911. Purchaser reimbursed by county when sale by mistake, etc.; liability of sheriff; state to refund, when. When by mistake or wrongful act of the sheriff real estate has been sold on which no tax was due at the time, or whenever land is sold in consequence of

error in describing such land in the tax receipt, the county or other municipal corporation shall reimburse the purchaser by paying to him the amount of principal and costs by him expended in such purchase, with interest thereon at six per centum per annum; and the sheriff shall be liable to the county, or other municipal corporation, upon his tax bond, for all amounts so expended by it; or the purchaser and assigns may recover such amount and interest directly from the sheriff in an action upon his tax bond. But the sheriff and his sureties in all such cases as are provided for in this section shall be liable only for the wrongful acts of the sheriff and his deputies. Any amount paid by the county under this section for state taxes shall, on proper certificate from the chairman of the board of county commissioners, be allowed by the auditor and paid by the state treasurer.

1901, c. 558, s. 21.

2912. Lien of purchaser. The purchaser at a sale for taxes, and his heirs and assigns, shall have a lien on the real estate by him purchased at such sale for the amount of the purchase-money paid and all interest, penalties, costs and charges allowed him by law; and, if, after his purchase, he pays any taxes levied upon or which constitute an incumbrance upon such real estate, whether assessed before or after such purchase, he shall have a lien for all sums so paid out and for all interest, penalties, costs and charges allowed him by law.

1901, c. 558, s. 9.

2913. Remedies of purchasers at tax sales; foreclosure by action; duty of county to foreclose. Every holder of a certificate of sale of real estate for taxes shall be subrogated to the lien of the state and of the county or other municipal corporation, for the taxes for which such real estate was sold, and, instead of demanding a deed for such real estate under the provisions of this chapter, shall be entitled to a judgment for the sale of such real estate for the satisfaction of whatever sums may be due to him upon such certificate of sale and for any other amounts expended by him upon any other such certificate of sale of such real estate, or for taxes paid which were a lien upon such real estate, whether paid prior or subsequent to the acquisition of such certificate of sale. Such relief shall be afforded in an action in the nature of an action to foreclose a mortgage, which action must be commenced within two years from the date of the last certificate of sale held by the plaintiff. Such action shall be governed in all respects, as near as may be, by the rules governing actions to foreclose a mortgage. Any one who has paid taxes on the subject matter of the action, or who holds a certificate of sale thereof, may be made a party and his rights enforced therein.

In such action the plaintiff must show that he gave ten days written notice of his intention to commence the same to the owner or occupant of the real estate which it is sought to sell; and in the complaint filed in such action each certificate of sale held by the plaintiff and each sum expended by him for taxes on such real estate, shall be set out as a separate cause of action. Inability to find the owner or occupant in the county shall excuse a failure to notify him of plaintiff's intention to sue.

The holder of a deed for real estate sold for taxes shall be entitled to the remedy provided by this section, if he elect to proceed thereunder. He must commence such action within two years from the last deed or certificate of sale held by him.

Every county or other municipal corporation shall have the right to foreclose for taxes under the provisions of this section, and it shall be the duty of its commissioners or other governing body or officials to institute and diligently prosecute such actions for all taxes on real estate for which it holds tax sale certificates or deeds remaining unredeemed as much as four years from the dates of such instruments. No such actions by such corporations shall be barred by the lapse of time as is above provided in this section or elsewhere in these Revised Statutes, for other actions, but only by the lapse of five years from the delivery of the certificate of sale or deed sought to be foreclosed.

In every action brought under this section, whether by a private individual or by the county or other municipal corporation, or any other corporation, the plaintiff shall, except in cases otherwise provided by law, be entitled to recover interest at the rate of twenty per centum per annum on all amounts paid out by him, or those under whom he claims, and evidenced by certificates of tax sale, deed under tax sale and tax receipts. Such interest shall be computed from date of each payment up to the time of redemption or final judgment, and shall be added to the principal of the final judgment, which judgment shall bear interest as in other cases.

1901, c. 558, ss. 34, 35, 36, 44.

XI. REDEMPTION.

2914. When, by whom and how effected; amount to be paid.

The owner or occupant of any land sold for taxes, or any person having a lien thereon or any interest or estate therein, may redeem the same, at any time within one year after the day of such sale, by paying the sheriff for the use of such purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest thereon at the rate of twenty per centum per annum from the date of purchase, together with all other taxes subsequently paid, whether for any year previous or subsequent to such sale, and interest thereon at the same rate from

the date of such payment, together with all costs and expenditures made or incurred in carrying out the provisions of this chapter. The sheriff shall enter a memorandum of the redemption in the list of sales and give a receipt therefor to the person redeeming the same, for which he may charge a fee of twenty-five cents, to be paid by the person redeeming, and shall hold the redemption money paid, subject to the order of the purchaser, his agent or attorney. But if any such purchaser, other than a county or other municipal corporation, shall suffer such real estate to be again sold for taxes, he shall be entitled to only ten per cent. interest, instead of twenty per cent., as allowed in this and the next preceding section.

After a deed for such real estate shall have been made to the purchaser by the sheriff, any person authorized to redeem before the execution of such deed may still redeem such real estate by paying to the grantee in each deed, his personal representatives or assigns at any time before the commencement by him, his personal representatives, heirs or assigns of an action of foreclosure under this chapter, or of an action of ejectment for such real estate, or within three years after such bargainee, his heirs or assigns shall have been in the notorious adverse possession of such real estate under such deed, where such possession is obtained without the institution of judicial proceedings, the same amounts that are required to be paid by this chapter for the redemption of such real estate before the deed therefor is executed, together with all further costs and expenditures incident to procuring such deed and the registration thereof. If the county or other municipal corporation be the grantee in such deed, the redemption money shall be paid to its treasurer.

Even after such actions of foreclosure or ejectment shall have been commenced, the defendant therein or any person having any interest or estate in, or lien upon such real estate, may redeem the same by paying into court for the use of the plaintiff, at any time before the time for answering the complaint has expired, the amounts required to be paid for redemption before the commencement of such action, with an additional amount sufficient to cover the costs of such action, and the further sum of five dollars, which is allowed to the plaintiff for his time and trouble in instituting such action.

1901, c. 558, ss. 11, 12.

2915. To whose benefit it inures. Any redemption made shall inure to the benefit of the person having the legal or equitable title to the property redeemed, subject to the right of the person making the same to be reimbursed by the person benefitted; which reimbursement is hereby made a condition precedent to the vesting of any interest or estate, under the benefits of this section, in the real estate redeemed in the person whose duty it is to make such reimbursement.

1901, c. 558, s. 11.

CHAPTER 76.

TOWNS.

| | Sections. |
|-------------------------------|-----------|
| I. Incorporation and powers. | 2916—2919 |
| II. Commissioners, | 2920—2923 |
| III. Powers of commissioners, | 2924—2932 |
| IV. Mayor, | 2933—2939 |
| V. Constable, | 2940—2942 |
| VI. Officers, | 2943—2945 |
| VII. Elections, | 2946—2969 |
| VIII. Taxes, | 2970—2975 |
| IX. Municipal debts, | 2976—2978 |
| X. Municipal property sold, | 2979—2981 |

I. INCORPORATION AND POWERS.

2916. Every town a body politic. Every incorporated town is a body politic and corporate, and shall have the powers prescribed by statute, and those necessarily implied by law, and no other.

Code, s. 702.

2917. Corporate powers. A town is authorized:

1. To sue and be sued in its corporate name.
2. Out of any funds on hand, and without creating any debt, to purchase and hold real estate for the use of its inhabitants.
3. To purchase and hold land, within or without its limits, not exceeding fifty acres, for the purpose of a cemetery, and to prohibit the burial of persons at any other place in said town, and to regulate the manner of burial in such cemetery.
4. To make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers.
5. To make such orders for the disposition or use of its property as the interest of the town requires.
6. To grant upon such reasonable terms and contracts franchises for public utilities.
7. To provide for the municipal government of its inhabitants in the manner required by law.
8. To levy and collect such taxes as are authorized by law.
9. To do and perform all other duties and powers authorized by law.

Code, ss. 704. 3817; 1901. c. 283.

2918. How corporate powers exercised. The corporate powers can be exercised only by the board of commissioners, or, in pursu-

ance of resolutions adopted by them, unless otherwise specially provided by law; which board shall consist of not less than three nor more than seven commissioners.

Code, ss. 703, 3787; R. C., c. 111, s. 1.

2919. How far this chapter applicable; meaning of "commissioners." This chapter shall apply to all incorporated cities and towns where the same shall not be inconsistent with special acts of incorporation, or special laws in reference thereto, and the word "commissioners" shall also be construed to mean "aldermen," or other governing municipal authorities. The sections of this chapter relating to municipal or town elections shall apply to all towns not expressly excepted by law.

Code, s. 3827; R. C., c. 111, s. 23.

II. COMMISSIONERS.

2920. Elected biennially by qualified voters. The board of commissioners of each town shall be biennially elected by the qualified voters thereof, at the time and in the manner prescribed by law.

Code, s. 3787.

2921. Oath of office of. The commissioners shall take and subscribe an oath before some person authorized by law to administer oaths that they will faithfully and impartially discharge the duties of their office, and such oath shall be filed with the mayor of such town and entered in a book kept for that purpose.

Code, s. 3799; R. C., c. 111, s. 12.

2922. Vacancy, how filled. In case of a vacancy after election in the office of commissioner the others may fill it until the next election.

Code, s. 3793; R. C., c. 111, s. 9.

2923. How number of, changed. After the first election the voters of any town may, whenever and as often as they choose, at the time of electing commissioners, and after due notice given thereof by the commissioners then in authority, by a majority of all the votes cast, alter the number of commissioners, so that the number be not more than seven nor less than three; and thenceforth the number of commissioners agreed on shall be chosen.

Code, s. 3791; R. C., c. 111, s. 7.

III. POWERS OF COMMISSIONERS.

2924. Ordinances, rules and regulations made by. The board of commissioners shall have power to make ordinances, rules and regulations for the better government of the town, not inconsistent

with this chapter and the law of the land, as they may deem necessary; and may enforce them by imposing penalties on such as violate them; and may compel the performance of the duties imposed upon others, by suitable penalties.

Code, ss. 3799, 3804; R. C., c. 111, ss. 12, 17.

Note. For proof of ordinances on appeal, see Evidence, s. 1583.

2925. May levy taxes. The board of commissioners may annually levy and cause to be collected for municipal purposes a tax not exceeding fifty cents on the hundred dollars, and one dollar and fifty cents on each poll, on all persons and property within the corporation, which may be liable to taxation for state and county purposes; and may annually lay a tax on all trades, professions and franchises carried on or enjoyed within the city, unless otherwise provided by law; and may lay a tax on all such shows and exhibitions for reward as are taxed by the general assembly; and on all dogs, and on swine, horses and cattle, running at large within the town; and on all persons, apothecaries and druggists excepted, retailing or selling liquors or wine of the measure of a quart or less, a tax not exceeding twenty-five dollars per year, if the sale of liquor is allowed in such town.

Code, s. 3800; R. C., c. 111, s. 13; 1862, c. 51.

2926. May appoint a constable and other officers; fix salary of mayor and others. The board of commissioners may appoint a town constable, and such other officers and agents as may be necessary to enforce their ordinances and regulations, keep their records, and conduct their affairs; may determine the amount of their salaries or compensation; and also the compensation or salary of the mayor; may impose oaths of office upon them, and require bonds from them payable to the state, in proper penalties for the faithful discharge of their duties.

Code, s. 3800; R. C., c. 111, s. 13; 1862, c. 51.

2927. May appoint police. The board of commissioners may appoint a town watch or police, to be regulated by such rules as the board may prescribe.

Code, s. 3803; R. C., c. 111, s. 16.

2928. Policemen may execute criminal process. A policeman shall have the same authority to make arrests and to execute criminal process, within the town limits, as is vested by law in a sheriff.

Code, s. 3811.

2930. May establish and regulate markets; street sales free, when. The board of commissioners may establish and regulate their markets, and prescribe at what place, within the corporation, shall

be sold marketable things; in what manner, whether by weight or measure, may be sold grain, meal or flour (if the flour be not packed in barrels), fodder, hay, or oats in straw; may erect scales for the purpose of weighing the same, appoint a weigher, fix his fees, and direct by whom they shall be paid. But it shall not be lawful for the commissioners or other authorities of any town to impose any tax whatever on wagons or carts selling farm products, garden truck, fish and oysters on the public streets thereof.

Code, s. 3801; R. C., c. 111, s. 14; 1879, c. 176.

2931. May abate nuisances. The board of commissioners may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens.

Code, s. 3802; R. C., c. 111, s. 15.

2932. Shall repair streets and bridges. The board of commissioners shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best; may cause such improvements in the town to be made as may be necessary, and may apportion the same equally among the inhabitants, by assessments of labor or otherwise, and the citizens shall not be liable to work on the public roads without the limits of the town. When they determine to repair or improve by labor, they may appoint an overseer and compel such persons as are liable to perform duty on the public roads to work on the streets, in the manner and under the penalties provided in the general law for the reparation of the public roads.

Code, s. 3803; R. C., c. 111, s. 16.

NOTE. For prohibition of title to streets, etc., by occupancy, see ss. 350, 351.

IV. MAYOR.

2933. How elected; tie vote; tenure of office; vacancy. In like manner, and at the same time when commissioners are elected, the voters may by ballot, under the inspection of the same persons and under the same rules and regulations, elect a mayor of the town; and the persons having the highest number of votes shall be declared elected. In case of a vacancy in the office, the commissioners may fill the same.

Code, s. 3794; R. C., c. 111, s. 10.

2934. To take oath of office. The mayor, before some justice of the peace, or other person authorized by law to administer oaths, shall take and subscribe the oaths prescribed for public officers, and an oath that he will faithfully and impartially discharge the duties

imposed upon him by law, which said oath shall be filed with the records of the town and be entered on the same book with the oaths of the commissioners.

Code, s. 3798; R. C., c. 111, s. 11.

2935. Presiding officer at commissioners' meetings; mayor pro tem. The mayor shall preside at the meetings of the commissioners, but shall have no vote except in case of a tie; and in the event of his absence or sickness, the board of commissioners may appoint one of their number pro tempore, to exercise his duties.

Code, s. 3794; R. C., c. 111, s. 10.

2936. Criminal jurisdiction of. The mayor of every city or incorporated town is hereby constituted an inferior court, and as such court such mayor shall be a magistrate and conservator of the peace, and within the corporate limits of his city or town shall have the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the state, or under the ordinances of such city or town. The rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor, and he shall be entitled to the same fees which are allowed to justices of the peace.

Code, s. 3818; 1871-2, c. 195; 1876-7, c. 243.

2937. Ordinances and penalties enforced; appeals. As such court the mayor shall have authority to hear and determine all cases that may arise upon the ordinances of the city or town; to enforce penalties by issuing execution upon any adjudged violation thereof, and to execute the laws and rules that may be made and provided by the board of commissioners of said city or town, for the government and regulation of the said city or town, but in all cases any person dissatisfied with the judgment of the mayor, may appeal to the superior court as in case of a judgment rendered by a justice of the peace.

Code, s. 3819; 1876-7, c. 243, s. 2.

2938. Mayor must certify ordinances on appeal. In all cases of appeal from a mayor's court to the superior or other court of appeal, when the offense charged is the violation of a town ordinance the mayor shall send with the papers in the case a true copy of the ordinance alleged to have been violated, and shall certify under his hand and seal that said ordinance was in force at the time of the alleged violation of the same.

1899, c. 277.

2939. May sentence to work on streets to pay fine. In all cases where judgments may be entered up against any person for

finer, according to the laws and ordinances of any incorporated town, and the person against whom the same is so adjudged refuses or is unable to pay such judgment, it may and shall be lawful for the mayor or chief officer before whom such judgment is entered, to order and require such person, so convicted, to work on the streets or other public works, until, at fair rates of wages, such person shall have worked out the full amount of the judgment and costs of the prosecution; and all sums received for such fines shall be paid to the treasurer of the county school funds. No woman shall be worked on the streets.

Code, s. 3806; 1897, c. 270; 1899, c. 128; 1866-7, c. 13.

V. CONSTABLE.

2940. To take an oath of office. The town constable shall, before some person authorized to administer oaths, take and subscribe to the oaths prescribed for public officers, and an oath that he will faithfully and impartially discharge the duties of his office according to law, which said oath shall be filed with the mayor and entered in the book with the oaths of the commissioners.

Code, s. 3808; R. C., c. 111, s. 20.

Note. For appointment of constable, see s. 889.

2941. Power as to process and as peace officer. As a peace officer, the constable shall have within the town all the powers of a constable in the county; and as a ministerial officer, he shall have power to serve all civil and criminal process that may be directed to him by any court within his county, under the same regulations and penalties as prescribed by law in the case of other constables, and to enforce the ordinances and regulations of the board of commissioners as the board may direct.

Code, ss. 3808, 3810; R. C., c. 111, s. 20; 1879, c. 266; 1897, c. 519; 1899, c. 168.

2942. Power as tax collector; bond. The constable shall have the same power to collect the taxes imposed by the commissioners as sheriffs have to collect the taxes imposed by the county commissioners, and he may be required by the commissioners to give bond, with sufficient surety, payable to the state of North Carolina, in such sum as the commissioners may prescribe, to account for the same; upon which suit may be brought by the commissioners, as upon the bonds of other officers. The bond of the constable shall be duly proved, before the mayor and commissioners, and registered in the office of the register of deeds.

Code, 3809; R. C., c. 111, s. 21.

VI. OFFICERS.

2943. Must be voters in town or city. No person shall be a mayor, commissioner, intendant of police, alderman or other chief officer of any city or town, unless he shall be a qualified voter therein.

Code, s. 3796; 1870-1, c. 24, s. 3.

2944. Penalty for refusing to qualify and act. Every person elected or appointed commissioner, mayor, or town constable, who, after being duly notified, shall neglect or refuse to qualify and perform the duties of his office or appointment, shall pay twenty-five dollars, one-half to the use of the town, and the other half to the use of any person who will sue for the same.

Code, s. 3812; R. C., c. 111, s. 22.

2945. Hold over, when. Whenever the day of election shall be altered, the officers of the corporation elected or appointed before that day, shall hold their places till the day of election, and until other officers shall be elected or appointed and qualified. And they shall hold their offices in like manner, when there is any failure to make the annual election.

Code, s. 3792; R. C., c. 111, s. 8.

VII. ELECTIONS.

2946. How far this chapter applicable. All elections held in any city or town shall be held under the following rules and regulations, except in the cities of Charlotte and Fayetteville, and in the town of Shelby, and in the towns in the counties of Bertie, Cabarrus, Caldwell, Catawba, Chowan, Columbus, Davidson, Edgecombe, Gaston, Harnett, Lenoir, Mitchell, Nash, Pitt, Randolph, Robeson, Stokes, Surry, Vance, Wayne and Wilson.

1901, c. 750, ss. 1, 21; 1903, cc. 184, 218, 626, 769, 777.

2947. When election held. In all cities and towns an election shall be held on Tuesday after the first Monday of May, one thousand nine hundred and five, and biennially thereafter.

1901, c. 750, s. 19.

2948. Polling places. There shall be at least one polling place in each ward in the town or city, if the said town or city is divided into wards; and if not divided into wards, then there shall be as many polling places as may be established by the governing body of said town or city.

1901, c. 750, s. 2.

2949. Registrars appointed; public notified; vacancy. The board of commissioners shall select, at least thirty days before any city or town election, one person for each election precinct, who shall act as registrar of voters for such precinct; and shall make publication of the names of the persons so selected, and of the time of the election, at the town or city hall, or at the usual place of holding the mayor's court, immediately after such appointment, and shall cause a notice to be served upon the registrars by the sheriff of the county or the township constable. If any registrar shall die or neglect to perform his duties, said governing body may appoint another in his place.

1901, c. 750, s. 5; 1903, c. 613.

2950. Registrars to take an oath. Before entering upon the duties of his office each registrar shall take an oath before some person authorized by law to administer oaths to faithfully perform the duties of his office as registrar.

1901, c. 750, s. 6.

2951. Registration of voters. It shall be the duty of the board of commissioners of every city and town to cause a registration to be made of all the qualified voters residing therein, under the rules and regulations prescribed for the registration of voters for general elections. And where there has been a registration of voters, the board of commissioners may, in its discretion, order a new registration of voters; and unless such new registration shall be ordered, the election shall be held under the existing registration, with such revision as is herein provided.

Code, s. 3795; 1901, c. 750, s. 3.

2952. Notice of new registration. In the event a new registration is ordered the board of commissioners shall give thirty days' notice thereof by advertisement in some newspaper, if there be one published in the town or city, and if there be none so published, then in three public places in the city or town.

1901, c. 750, s. 4.

2953. Registration books revised. Each registrar shall be furnished with registration books, and it shall be his duty to revise the registration book of his precinct in such manner that said books shall show an accurate list of the electors previously registered in such ward or precinct and still residing therein, without requiring such electors to be registered anew.

1901, c. 750, s. 6.

2954. When registration books opened and closed; who may register. Each registrar shall, between the hours of nine o'clock

a. m. and five o'clock p. m. on each day (Sunday excepted) for seven days preceding the day for closing the registration books, as herein-after provided, keep open said books for the registration of any new electors residing in the precinct, and entitled to register, whose names have never before been registered in such precinct, or do not appear in the revised list. Such books shall be open until nine o'clock p. m. of each Saturday during such registration period and shall be closed for registration on the second Saturday before each election.

1901, c. 750, s. 6.

2955. Registration on election day. No registration shall be allowed on the day of election, but if any person shall give satisfactory evidence to the registrar and judges of election that he has become of the age of twenty-one years since the registration books were closed for registration, or has for any other reason on that day become entitled to register and vote, he shall be allowed to register and vote.

1901, c. 750, s. 8.

2956. Vacancies on election day. If any vacancy shall occur on the day of election in the office of registrar, the same shall be filled by the judges of election, and if any vacancy shall occur on that day in the office of judge the same shall be filled by the registrar; vacancies occurring at any other time shall be filled by the board of commissioners.

1901, c. 750, s. 20.

2957. When books open for challenge. On the second Saturday before the election the registration books shall be kept open at the polling place in the precinct for the inspection of the electors of the precinct, and any of such electors shall be allowed to object to the name of any person appearing on said books.

1901, c. 750, s. 7.

2958. Practice in challenges. When a person is challenged the registrar shall enter upon his books opposite the name of the person objected to the word "Challenged," and the registrar shall appoint a time and place, on or before the Monday immediately preceding election day, when he, together with the judges of election, shall hear and decide the objection, giving personal notice to the voter so objected to; and if for any cause, personal notice can not be given, then it shall be sufficient to leave a copy thereof at his residence. If any person challenged shall be found not duly qualified, the registrar shall erase his name from the books. They shall hear and determine the cause of challenge under the rules and regu-

lations prescribed by the general law regulating elections for members of the general assembly.

1901, c. 750, ss. 7, 9.

2959. Registration books, where deposited. Immediately after any election the registrars shall deposit the registration books for the respective precincts with the board of commissioners.

1901, c. 750, s. 11.

2960. Judges of election appointed; oath of. The board of commissioners shall appoint, at least thirty days before any city or town election, two judges of election, who shall be of different political parties where possible, and shall be men of good character, able to read and write, at each place of holding election in said city or town, who, before entering upon the discharge of their duties, shall take an oath, before some person authorized by law to administer oaths, to conduct the election fairly and impartially, according to the constitution and laws of the state.

1901, c. 750, s. 7.

2961. Judges superintend election; poll books. The judges of election shall open the polls and superintend the same until the close of election; they shall keep poll books in which shall be entered the name of every person who shall vote, and at the close of the election they shall certify the same over their proper signatures and deposit them with the board of commissioners.

1901, c. 750, s. 7.

2962. When polls open and close. The polls shall be open on the day of election from eight o'clock a. m. till sunset, and no longer; and each person whose name may be registered shall be entitled to vote.

1901, c. 750, s. 10.

2963. Who may vote. All qualified electors who shall have resided for four months immediately preceding an election within the limits of any voting precinct of a city or town, and not otherwise, shall have the right to vote in such precinct for mayor and other city or town officers.

1901, c. 750, s. 9.

2964. Ballots and ballot boxes. All ballots shall be printed or written upon white paper and shall be of the same size, without device, mutilation or ornamentation, the size of ballots to be fixed by board of commissioners at the same meeting the registrar is appointed. The governing body of the city or town shall provide for each election precinct in their respective cities or towns neces-

sary ballot boxes in which to deposit the ballots; each of such boxes shall have an opening through the lid to admit a single folded ballot, and no more. The ballot boxes shall be kept by the judges of election for the use of the election precincts respectively; and the registrar and judges of election, before the voting begins, shall carefully examine the ballot boxes and see that there is nothing in them, and they shall be sealed or securely fastened and not be opened until the polls are closed.

1901, c. 750, s. 12; 1903, c. 613, s. 2.

2965. Ballots counted; result declared; void ballots. When the election shall be finished the registrar and judges of election shall open the boxes and count the ballots, reading aloud the names of the persons which shall appear on each ballot; and if there shall be two or more ballots rolled up together, or any ballot shall contain the names of more persons than the elector has the right to vote for, or shall have a device or ornament upon it, in either of these cases such ballots shall not be numbered in taking the ballots, but shall be void; and the counting of votes shall be continued without adjournment until completed, and the result thereof declared.

1901, c. 750, s. 13.

2966. Board of canvassers; original returns. The registrar and judges of election in each voting precinct shall appoint one of their number to attend the meeting of the board of canvassers as a member thereof, and shall deliver to the member who shall have been so appointed the original returns of the result of the election in such precinct; and the members of the board of canvassers who shall have been so appointed shall attend the meeting of the board of canvassers, and shall constitute the board of town canvassers for such election, and a majority of them shall constitute a quorum. In towns where there is only one voting precinct, the registrar and judges of election shall, at the close of the election, declare the result thereof.

1901, c. 750, ss. 13, 14.

2967. When and where board meets; oath. The board of canvassers shall meet on the next day after the election at twelve o'clock m., at the mayor's office, and they shall each take the oath prescribed in the general law governing elections for members of the board of county canvassers.

1901, c. 750, s. 15.

2968. Board determines result; tie vote. The board of canvassers shall, at their meeting, in the presence of such electors as choose to attend, open, canvass and judicially determine the result, and shall make abstracts, stating the number of legal ballots cast

in each precinct for each office, the name of each person voted for and the number of votes given to each person for each different office, and shall sign the same. It shall have power and authority to judicially pass upon all the votes relative to the election and judicially determine and declare the result of the same, and shall have power and authority to send for papers and persons and examine the latter upon oath; and in case of a tie between two opposing candidates, the result shall be determined by lot. In all other respects all elections held in any town or city shall be conducted as prescribed for the election of members of the general assembly.

1901, c. 750, ss. 16, 17.

2969. Notice of special election. No special election shall be held for any purpose in any county, township, city or town unless at least thirty days' notice shall have been given of the same by advertisement in some newspaper published in said county, city or town, or by advertisement posted at the courthouse of the county and four other public places in such county, city or town.

1901, c. 750, s. 24.

VIII. TAXES.

2970. Must be uniform and ad valorem. All taxes levied by any county, city, town, or township, shall be uniform and ad valorem, upon all property in the same, except property exempted by this constitution.

Const., Art. VII, s. 9.

2971. Tax list taken, by whom; failure to list, pays double tax. The mayor, or other suitable person, shall, by order of the commissioners, take the list of taxables in the town, in such manner and at such time as the commissioners shall prescribe. If any person fail to list his taxables within the time prescribed by the commissioners, he shall be liable to a double tax.

Code, s. 3807; R. C., c. 111, s. 19.

Note. See s. 2925.

2972. Tax list corrected. All tax lists, either county or municipal, which may be placed in the hands of any sheriff or tax collector, shall be at all times under the control of the authorities imposing the tax, and subject to be corrected, or altered by them, and shall be open for inspection by the public, and upon demand by the authorities imposing the tax, or their successors in office, shall be surrendered to the lawful authorities for such inspection or correction.

Code, s. 3823; 1870-1, c. 177, s. 2.

2973. Dog tax. If any person residing in a town shall have therein any dog, and shall not return it for taxation, and shall fail to pay the tax according to law, the commissioners, at their option, may collect from the person so failing double the tax, or may treat such dog as a nuisance, and order his destruction.

Code, s. 3815; R. C., c. 111, s. 24.

2974. Monthly settlements by tax collector. Each town and city constable, or any other officer authorized by any town or city to collect taxes, fines or penalties, shall make a monthly settlement of all moneys coming into his hands, with the town treasurer or other officer authorized to receive the same.

Code, s. 3813; 1879, c. 194.

2975. Annual statement taxes received and disbursed, published. The commissioners shall annually publish an accurate statement of the taxes levied and collected in the town, together with a statement of the amount expended by them, and for what purpose. And any board of commissioners failing to comply with this section shall forfeit and pay one hundred dollars to any person who will sue for the same.

Code, s. 3816; R. C., c. 111, s. 25.

IX. MUNICIPAL DEBTS.

2976. No debt or tax except for necessities, but by vote of people. No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

Const., Art. VII, s. 7.

2977. How paid. Debts contracted by a municipal corporation in pursuance of authority vested in it, shall not be levied out of any property belonging to such corporation and used by it in the discharge and execution of its corporate duties and trusts, nor out of the property or estate of any individual who may be a member of such corporation or may have property within the limits thereof. But all such debts shall be paid alone by taxation upon subjects properly taxable by such corporation: Provided, that whenever any individual, by his contract, shall become bound for such debt, or any person may become liable therefor by reason of fraud, such person may be subjected to pay said debt.

Code, s. 3821; 1870-1, c. 90.

2978. Limited to ten per cent. of assessed values. It shall be unlawful for any city or town to contract any debt, pledge its faith or loan its credit for the construction of railroads, the support or maintenance of internal improvements or for any special purpose whatsoever, to an extent exceeding in the aggregate ten per cent. of the assessed valuation of the real and personal property situated in such county, city, town or township. And the levy of any tax to pay any such indebtedness in excess of this limitation shall be void and of no effect.

1889, c. 486.

X. MUNICIPAL PROPERTY SOLD.

2979. By mayor and commissioners at public sale. The mayor and commissioners of any town shall have power at all times to sell at public outcry, after thirty days' notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best.

Code, s. 3824; 1872-3, c. 112.

2980. By county commissioners, if town is unincorporated. In any town where there is no mayor or commissioners, the board of county commissioners shall have the power given in the preceding section.

Code, s. 3825; 1872-3, c. 112, s. 2.

2981. Title made by mayor. The mayor of any town, or the chairman of any board of commissioners, of any town or county, is fully authorized to make title to the purchaser of any property sold under this chapter.

Code, s. 3826; 1872-3, c. 112, s. 3.

CHAPTER 77.

TRADEMARKS.

- I. Generally,
- II. Timber,
- III. Live stock,

Sections.
 2982—2992
 2993—2997
 2998

I. GENERALLY.

2982. Trademarks, labels, etc., filed for registry. It shall be lawful for any person to adopt for his protection and file for registry, as in this chapter provided, any label, trademark, term or design that has been used or is intended to be used for the purpose of designating, making known or distinguishing any goods, wares, merchandise or products of labor that have been or may be wholly or partly made, manufactured, produced, prepared, packed or put on sale by any such person, or to or upon which any work or labor has been applied or expended by any such person, or by any member of any corporation that has adopted and filed for registry any such label, trademark, term or design as aforesaid, or announcing or indicating that the same have been made in whole or in part by any such person or corporation, or by any member thereof.

1903, c. 271.

2983. Property rights protected by filing for registry. Whenever any person shall adopt and file for registry any label, trademark, term or design pursuant to the provisions of this chapter, the property, privileges, rights, remedies and interests in and to any such label, trademark, term or design, and in and to the use of same, provided or given by this chapter to, or otherwise conferred upon or enjoyed by, the person filing the same for the registry, shall be fully and completely secured, preserved and protected as the property of those entitled to the same before any such label, trademark, term or design has been actually applied to any goods, wares, merchandise, or product of labor, and put upon the market for sale or otherwise, and before any use or appropriation of any such label, trademark, term or design has been made in connection with any such goods, wares, merchandise or product of labor, as well as after the same has been used or applied to designate, make known or distinguish any such goods, wares, merchandise, or product of labor and they have been put upon the market.

1903, c. 271, s. 2.

2984. Filed with secretary of state; affidavit; fees. Any person who has heretofore adopted and used, or shall hereafter adopt and use any label, trademark, term or design, as in this chapter provided, may file the same for registry in the office of the secretary of state, by leaving two copies, fac similes or counterparts thereof, with the said secretary, and filing therewith a statement in the form of an affidavit, subscribed and sworn to by any such person, or by any officer, agent or attorney if a corporation, specifying the person by whom any such label, trademark, term or design is filed, and the class or character of the goods, wares, merchandise or products of labor to which the same has been, or is intended to be appropriated or applied, and that the person so filing the same has the right to the use of the said label, trademark, term or design, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive, without the permission or authority of the person filing the same, and that the copies, fac similes or counterparts filed therewith, are true and correct copies, fac similes or counterparts of the genuine label, trademark, term or design of the person filing the same, and there be paid for such registry a fee of one dollar to the secretary of state for the use of the state, and the same recording fees required by law for recording certificate of organization of corporations.

1903, c. 271, s. 3.

2985. Registration; certified copies evidence; fees. The secretary of state, upon the filing of any such label, trademark, term or design, that is not in conflict with the next section, shall register the same, and shall deliver to the person filing the same as many certified copies thereof, with his certificate of such registry, as any such person may request, and for every such copy and certificate there shall be paid to the secretary of state, for the use of the state, a fee of one dollar; and any such certified copy and certificate shall be admissible in evidence and competent and sufficient proof of the adoption, filing and registry of any such label, trademark, term or design, by any such person in any action or judicial proceeding in any of the courts of this state, and of due compliance with the provisions of this chapter.

1903, c. 271, s. 4.

2986. How transferred. The right to use any registered label, trademark, term or design shall be granted only by an instrument in writing, duly filed in the office of the secretary of state. The fees for recording or filing such transfer and issuing copies thereof shall be the same as for filing such label, trademark, term or design.

2987. Similar trademarks refused registration. It shall not be lawful for the secretary of state to register for any person any label, trademark, term or design that is in the identical form of any other label, trademark, term or design theretofore filed by any other person, or that bears any such near resemblance thereto as may be calculated to deceive, or that would be liable to be mistaken therefor.

1903, c. 271, s. 5.

2988. Penalty for securing fraudulent registration. Any person who shall file or procure the filing and registry of any label, trademark, term or design in the office of the secretary of state under the provisions of this chapter, by making any false or fraudulent representations or declarations, with fraudulent intent, shall be liable to pay any damages sustained in consequence of any such registry, to be recovered by or in behalf of the party injured thereby.

1903, c. 271, s. 5.

2989. Use of counterfeit trademarks unlawful. Whenever any person has adopted and filed for registry any label, trademark, term or design, as provided by law, and the same shall have been registered pursuant to law, it shall be unlawful for any other person to manufacture, use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trademark, term or design, or have in possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise or product of labor to which or on which any counterfeit or imitation of any such label, trademark, term or design is attached, affixed, printed, stamped, impressed or displayed, or to sell or dispose of, or offer to sell or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor contained in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, stamped, impressed or displayed.

1903, c. 271, s. 6.

2990. Unauthorized use unlawful; use under license. Whenever any person has adopted and registered any label, trademark, term or design, as provided by law, it shall be unlawful for any other person to make any use, sale, offer for sale or display of the genuine label, trademark, term or design of any such person filing the same, or to have any such genuine label, trademark, term or design in possession with intent that the same shall be used, sold, offered for sale, or displayed, or that the same shall be applied, attached or displayed in any manner whatever to or on any goods, wares or merchandise, or to sell, offer to sell, or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods.

wares or merchandise in any box, case, can or package to or on which any such genuine label, trademark, term or design of any such person is attached, affixed, or displayed, or to make any use whatever of any such genuine label, trademark, term or design, without first obtaining in every such case the license of the person adopting, filing and registering the same; and any such license may be revoked and terminated at any time upon notice, and thereafter any use thereof shall be unlawful.

1903, c. 271, s. 7.

2991. Remedies; damages; profits; destruction of counterfeits. Any person who has registered any label, trademark, term or design under the provisions of this chapter shall have a right of action against any person for the unauthorized use of such label, trademark, term or design, and the courts shall by appropriate remedies prevent the unauthorized or unlawful use, manufacture or display of any label, trademark, term or design, or the imitation or counterfeit thereof, or the sale, disposal or display of any articles of property on which any counterfeit or imitation of any registered label, trademark, term or design, or on which any genuine label, trademark, term or design may be used or displayed without proper authority; and shall further secure and protect all persons in all rights of property and interest which they may have in any label, trademark, term or design registered under this chapter; and the court shall award to the plaintiff any and all damages resulting from any such wrongful use of any such label, trademark, term or design; and any counterfeit or imitation of any labels, trademarks, terms, or designs and any die, engraving, mould or mechanical device or the manufacture of the same in the possession or under the control of the defendant, shall be delivered up to an officer of the court, to be destroyed, and that any such genuine labels, trademarks, terms or designs, in the possession or under the control of any such defendant shall be delivered to the plaintiff.

1903, c. 271, s. 8.

2992. Additional penalty. In addition to any other rights, remedies or penalties provided by this chapter, and as concurrent therewith, any person who shall violate any of the provisions of this chapter shall be liable to a penalty of two hundred dollars, to be recovered by any person who has filed any such label, trademark, term or design.

1903, c. 271, s. 9.

II. TIMBER.

2993. Who may adopt. Any person dealing in timber in any form shall be known as a timber dealer and as such may adopt a trademark, in the manner and with the effect in this subchapter provided.

1903, c. 261, s. 1.

2994. How adopted, registered and published. Every such dealer desiring to adopt a trademark may do so by the execution of a writing in form and effect as follows:

TRADEMARK.

Notice is hereby given that I (or we, etc., as the case may be) have adopted the following trademark, to be used in my (or our, etc.) business as timber dealer (or dealers), to-wit: (Here insert the words, letters, figures, etc., constituting the trademark, or if it be any device other than words, letters or figures, insert a fac simile thereof).

Dated this day of, 19...

A..... B.....

The said writing shall be acknowledged or proved for record in the same manner as deeds are acknowledged or proved, and shall be registered in the office of the register of deeds of the county in which the principal office or place of business of such timber dealer may be, in a book to be kept for that purpose marked "Registry of Timber Marks," also in office of secretary of state, and a copy thereof shall be published at least once in each week for four successive weeks in some newspaper printed in such county, or if there be no such newspaper printed therein, then in some newspaper of general circulation in such county.

1889, c. 142; 1903, c. 261, s. 2.

2995. Property in; how used. Every trademark so adopted shall, from the date thereof, be the exclusive property of the person adopting the same. The proprietor of such trademark shall, in using the same, cause it to be plainly stamped, branded or otherwise impressed upon each piece of timber upon which the same is placed.

1889, c. 142; 1903, c. 261, ss. 3, 4.

2996. Branding with, effect of. When timber is purchased by the proprietor of any such trademark, and the said trademark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties.

1889, c. 142; 1903, c. 261, s. 6.

2997. Branding with, evidence of ownership. In any action, suit or contest, in which the title to any timber, upon which any trademark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trademark, in the absence of satisfactory proof to the contrary.

1903, c. 261, s. 7.

III. LIVE STOCK.

2998. Owners of stock to register brand or mark. Every person who hath any horses, cattle, hogs or sheep may have an earmark or brand different from the earmark or brand of all other persons, which he shall record with the clerk of the board of commissioners of the county where his horses, cattle, hogs or sheep are; and he may brand all horses eighteen months old and upwards with the said brand, and earmark all his hogs and sheep six months old and upwards with the said earmark; and earmark or brand all his cattle twelve months old and upwards; and if any dispute shall arise about any earmark or brand, the same shall be decided by the record thereof.

Code, s. 2317; R. C., c. 17, s. 1.

NOTE. For unlawful use of timber trademark, see Crimes.
For buying branded logs, see Crimes.

CHAPTER 78.

WAREHOUSEMEN.

| | Sections. |
|--------------------------------|-----------|
| I. Public, | 2999—3011 |
| II. Tobacco warehouse charges, | 3012—3014 |

I. PUBLIC WAREHOUSEMEN.

2999. Who may become. Any corporation organized under the laws of this state and whose charter authorizes it to engage in the business of a warehouseman, may become a public warehouseman and authorized to keep and maintain public warehouses for the storage of cotton, goods, wares and other merchandise as herein-after prescribed and upon giving the bond hereinafter required.

1901, c. 678.

3000. Bond to clerk of court; penal sum. Every such corporation so organized under the preceding section to become a public warehouseman shall give bond in a reliable bonding or surety company payable to the state of North Carolina in an amount not less than twenty-five thousand dollars, to be approved, filed with and recorded by the clerk of the superior court of the county in which the warehouse is located, for the faithful performance of the duties of a public warehouseman.

1901, c. 678, s. 2.

3001. Injured person may sue on bond. Whenever such warehouseman fails to perform any duty or violates any of the provisions of this chapter, any person injured by such failure or violation may bring an action in his name and to his own use in any court of competent jurisdiction on the bond of said warehouseman.

1901, c. 678, s. 3.

3002. Insurance on stored property; storage receipts. Every such warehouseman shall, when requested thereto, ~~is sitting~~ by a party placing property with it on storage, cause such property to be insured; every such warehouseman shall, except as hereinafter provided, give to each person depositing property with it for storage a receipt therefor, which shall be negotiable in form and shall describe the property, distinctly stating the brand or distinguishing marks upon it, and if such property is grain, the quantity and inspected grade thereof. The receipts shall also state the rate of charges for storing the property and amount and rate of any other charge thereon, and also the amount of the bond and name of the company in which the bond is taken, given to the said clerk of the court as hereinabove provided: Provided, that every such warehouseman shall, upon request of any person depositing property with it for storage, give to such person its non-negotiable receipt therefor, which receipt shall have the words "Non-negotiable" plainly written, printed or stamped on the face thereof; and provided, that the assignment of said non-negotiable receipt shall not be effective until recorded on the books of the warehousemen issuing it.

1901, c. 678, s. 4.

3003. Title passes with storage receipt. The title to cotton, goods, merchandise and chattels stored in public warehouses shall pass to a purchaser or pledgee by the endorsement and delivery to him of the warehouseman's receipt therefor, signed by the person to whom such receipt was originally given or by the endorsee of such receipt, unless such receipt is non-negotiable.

1901, c. 678, s. 5.

3004. Title when goods are mixed. When grain or other property is stored in public warehouses in such manner that different lots or parcels are mixed together, or that the identity can not be accurately preserved, the warehouseman's receipt for any such portion of grain or property shall be deemed a valid title to so much thereof as is designated in receipt without regard to separation or identification.

1901, c. 678, s. 6.

3005. Books of account kept; open for inspection. Every such warehouseman shall keep a book in which shall be entered an account of all its transactions relating to warehousing, storing and insuring cotton, goods, wares and merchandise, and to the issuing of receipts therefor, which books shall be open to the inspection of any person actually interested in the property to which such entry relates.

1901, c. 678, s. 7.

3006. Sale of property for storage charges one year overdue; proceeds; notice of sale. Every such public warehouseman which shall have in its possession any property by virtue of any agreement or warehouse receipt for the same, for which a claim for storage is at least one year overdue, may proceed to sell the same at public auction, and out of the proceeds may retain all charges for storage of such goods, wares and merchandise, and any advances that may have been made thereon by it, and the expense of advertising and sale thereof, but no sale shall be made until after the giving a printed or written notice of such sale to the person in whose name the said goods, wares and merchandise were stored, requiring him, naming him, to pay the arrears or amount due for such storage, and in case of default in so doing, the goods, wares and merchandise shall be sold to pay the same, at a time and place to be specified in such notice.

1901, c. 678, s. 8.

3007. Notice, how served; return of; publication. The notice required in the preceding section shall be served by delivering it to the person in whose name such goods, wares and merchandise were stored, or by leaving it at his usual place of abode, if within this state, at least thirty days before the time of sale, and a return of the service shall be made by some officer authorized to serve civil process, or by some other person, with an affidavit of the truth of the return. If the party storing such goods can not with reasonable diligence be found within this state, then such notice shall be given by publication once each week for two successive weeks, the last publication to be at least ten days before the time of such sale, in a newspaper published in the city or town where such warehouse is

located. In the event that the party storing such goods shall have parted with the same, and the purchaser shall have notified the warehouseman with his address, such notice shall be given to such person in lieu of the person storing the goods.

1901, c. 678, s. 9.

3008. Surplus disposed of. Every such warehouseman shall make an entry in a book kept for that purpose of the amount of the proceeds of all sales, and any balance shall be paid over to the person entitled thereto on demand. If such balance is not demanded by the owner within six months after such sale, it shall be paid by said warehouseman to the clerk of the court of the county in which said warehouse is located, and he shall pay the same to the party entitled thereto, if demanded within ten years after said sale; and such warehouseman shall at the same time file with said clerk an affidavit in which shall be stated the name and place of residence of the party entitled thereto so far as the same are known.

1901, c. 678, s. 10.

3009. When perishable or dangerous property is stored; proceeds of sale paid to clerk, when. Whenever a public warehouseman has in its possession any property of a perishable nature, or which will deteriorate greatly in value by keeping, or upon which the charges for storage will be likely to exceed the value thereof, or which by its odor, leakage, inflammability or explosive nature is likely to injure other goods, such property having been stored upon non-negotiable receipts, and when the warehouseman has notified the person in whose name the property was received to remove such property and such person has refused or omitted to remove the property and to pay the storage and proper charges thereon, the public warehouseman may, in the exercise of a reasonable discretion, sell the same at public or private sale without advertising, and the proceeds, if there are any, after deducting the amount of said storage and charges, and expense of sale, shall be paid or credited to the person in whose name the property was stored, and if said person can not be found on reasonable inquiry, the sale may be made without any notice and the proceeds of such sale after deducting the amount of storage or expense of sale, shall be paid to the clerk of the court of the county wherein said warehouse is situated, who shall pay the same to the person entitled thereto, if called for or claimed by the rightful owner within five years of the receipt thereof by said clerk.

1901, c. 678, s. 12.

3010. When unable to sell perishable or worthless property. Whenever a public warehouseman under the provisions of the pre-

ceding section has made a reasonable effort to sell perishable and worthless property, and has been unable to do so, because of its being of little or no value, it may then proceed to dispose of such property in any lawful manner, and it shall not be liable in any way for property so disposed of.

1901, c. 678, s. 13.

3011. Storer liable for charges, when. Whenever a public warehouseman under the provisions of the two preceding sections has sold or otherwise disposed of property and the proceeds thereof have not been sufficient to pay the expenses of sale, storage and other charges against said property, then the person in whose name said property was stored shall be liable to said public warehouseman for such deficit.

1901, c. 678, s. 14.

NOTE. For criminal liability of persons storing or dealing in storage certificates, see Crimes.

II. TOBACCO WAREHOUSE CHARGES.

3012. Maximum charges fixed. The charges and expenses of handling and selling leaf tobacco upon the floor of tobacco warehouses shall not exceed the following schedule of prices, viz.: For auction fees, fifteen cents on all piles of one hundred pounds or less, and twenty-five cents on all piles over one hundred pounds; for weighing and handling, ten cents per pile for all piles less than one hundred pounds, for all piles over one hundred pounds at the rate of ten cents per hundred pounds; for commissions on the gross sales of leaf tobacco in said warehouses not to exceed two and one-half per centum.

1895, c. 81.

3013. Weighers sworn. All leaf tobacco sold upon the floor of any tobacco warehouse shall first be weighed by some reliable person, who shall have first sworn and subscribed to the following oath, to-wit: "I do solemnly swear (or affirm) that I will correctly and accurately weigh all tobacco offered for sale at the warehouse of, and correctly test and keep accurate the scales upon which the tobacco so offered for sale is weighed." Such oath shall be filed in the office of the clerk of the superior court of the county in which said warehouse is situated.

1895, c. 81, s. 2.

3014. Bill of charges rendered; penalty. The proprietor of each and every warehouse shall render to each seller of tobacco at his warehouse a bill plainly stating the amount charged for weighing

and handling, the amounts charged for auction fees, and the commission charged on such sale, and it shall be unlawful for any other charges or fees to be made or accepted. For each and every violation of the provisions of this subchapter a penalty of ten dollars may be recovered by any one injured thereby.

1895, c. 81, ss. 3, 4.

CHAPTER 79.

WATER SUPPLIES.

| | Sections. |
|--------------------------------|-----------|
| I. Protection of watersheds, | 3015—3023 |
| II. Analyses, | 3024—3026 |
| III. Miscellaneous provisions, | 3027—3029 |
| IV. For public institutions, | 3030—3031 |

I. PROTECTION OF WATERSHEDS.

3015. Inspection of. Any water-works that derive their supply from lakes or ponds or from small streams not more than fifteen miles in length, shall have a sanitary inspection of the entire watershed not less, under any circumstances, than once every three calendar months, and a sanitary inspection of any particular locality on said watershed at least once in each calendar month, whenever in the opinion of the board of health of the city or town to which the water is supplied, or when there is no such local board of health, in the opinion of the county superintendent of health, or, in the opinion of the state board of health, there is reason to apprehend the infection of the water in that particular locality. Such companies or municipal corporation shall cause to be made a sanitary inspection of any particular locality on said watershed at least once in each week, whenever in the opinion of the board of health of the city or town to which the water is supplied, or when there is no such local board of health, in the opinion of the county superintendent of health, or in the opinion of the state board of health, there is special reason to apprehend the infection of the water from that particular locality by the germs of typhoid fever or cholera. The inspection of the entire watershed, as herein provided for, shall include a particular examination of the premises of every inhabited house of the watershed, and in passing from house to house a general inspection for dead bodies of animals or accumulation of filth. It is not

intended that the term "entire watershed" shall include uninhabited fields and wooded tracts that are free from suspicion. The inspection shall be made by an employee of, and at the expense of said water company or municipal corporation, in accordance with reasonable instructions as to method, to be furnished by the secretary of the state board of health. The said sanitary inspector shall give in person to the head of each household on said watershed, or in his absence to some member of said household, the necessary directions for the proper sanitary care of his premises. It shall further be the duty of said inspector to deliver to each family residing on the watershed such literature on pertinent sanitary subjects as may be supplied him by the municipal health office, or by the secretary of the state board of health.

1899, c. 670; 1903, c. 159, s. 2.

3016. Rivers and large creeks inspected fifteen miles. In case of those companies obtaining their supply of water from rivers or large creeks having a minimum daily flow of ten million gallons the provisions of the preceding section shall be applied to the fifteen miles of watershed draining into the said river or creek next above the intake of the water-works.

1899, c. 670, s. 3; 1903, c. 159, s. 3.

3017. Penalty for failing to inspect. Failure on the part of any water company to comply with the requirements in regard to inspections and analyses provided for in this chapter, shall be punished by a deduction from any charges for water against the city or town supplied of twenty-five dollars for each and every such failure: Provided, that in no one year shall the sum of such forfeitures exceed five hundred dollars.

1899, c. 670, s. 4; 1903, c. 159, s. 5.

Note. When water-works owned by municipality, officers failing to make inspection indictable, see Crimes.

3018. Cities and towns to make inspection. Every city or town having a public water supply shall, at its own expense, have made at least once in every three months by one of its own officials a sanitary inspection of the entire watershed of its water supply, and it shall be the duty of the official making such inspection to report to the mayor any violation of this chapter.

1899, c. 670, s. 5; 1903, c. 159, s. 6.

3019. Residents on watersheds to obey instructions. Every person residing or owning property on the watershed of a lake, pond or stream, from which a public drinking supply is obtained, shall carry out such reasonable instructions as may be furnished him in

the manner hereinbefore set forth, or directly by the municipal health officer, or by the state board of health.

1903, c. 159, s. 7.

Note. Failure to comply with this section a misdemeanor, see Crimes.

3020. Inspectors may enter upon premises. Each sanitary inspector herein provided for is authorized and empowered to enter upon any premises and into any building upon his respective watershed for the purpose of making the inspections required.

1899, c. 670, s. 8; 1903, c. 159, s. 10.

3021. Sewage not discharged in. No person or municipality shall flow or discharge sewage into any drain, brook, creek or river from which a public drinking water supply is taken, unless the same shall have been passed through some well known system of sewage purification approved by the state board of health; and the continual flow and discharge of such sewage may be enjoined upon application of any person.

1903, c. 159, s. 13.

Note. For violation of above section, see Crimes.

Polluting watershed misdemeanor, see Crimes.

Depositing human excreta misdemeanor, see Crimes.

3022. Towns, etc., not having sewerage system. All schools, hamlets, villages, towns or industrial settlements which are now located, or may hereafter be located on the shed of any public water supply, not provided with a sewerage system, shall provide and maintain a tub system for collecting human excrement, and provide for removal of the same from the watershed at least twice each week.

1903, c. 159, s. 14.

Note. Failure to comply with this section misdemeanor, see Crimes.

3023. No cemetery on watershed. No burying ground or cemetery shall be established on the watershed of any public water supply nearer than five hundred yards of the source of supply.

1903, c. 159, s. 15.

II. ANALYSES.

3024. To be made. Every water company, whether owned by private individuals or corporations, or by a municipality, shall have made, not less frequently than once in every three months, at its own expense, by the chemist of the state board of health, or such chemist as the said board may designate, a chemical analysis, and once every month a bacteriological examination at its own expense by the biologist of the state board of health, or such biologist as said board may designate, of a sample of its water drawn from a faucet used for drinking purposes, packed and shipped in accordance with

the instructions to be furnished by the secretary of the state board of health: Provided, that when the supply is from a flowing artesian well said analysis shall be made in the discretion of the secretary of the state board of health.

1899, c. 670, s. 6; 1903, c. 159, s. 4.

3025. State board of health may have examination made; fee.

For carrying out the provisions of this chapter the state board of health is authorized and empowered to have the bacteriological examination made as hereinbefore provided for, and to charge for the same the sum of five dollars for each examination.

1903, c. 159, s. 17.

3026. State board of health to make examinations. As a check and guarantee of the faithful performance of the requirements laid down in this chapter the state board of health shall make or have made by its authorized agents such inspections of the watersheds and such chemical and bacteriological examinations of the public water supplies of the state as may be deemed necessary to insure their purity. Should such inspections or examinations show conditions dangerous to the public health the secretary of the state board of health shall notify the mayor, the municipal health officer and the superintendent or manager of the water-works at fault and demand the immediate removal of said dangerous conditions. If at the end of thirty days after the service of said notice and demand the said dangerous conditions have not been removed to the extent that due diligence could accomplish such removal, the said secretary shall have printed in one or more of the local newspapers a plain statement of the facts for the information and protection of the citizens using the water.

1899, c. 670, s. 7; 1903, c. 159, s. 9.

III. MISCELLANEOUS PROVISIONS.

3027. Precaution against contamination. In the interest of the public health every person, company, municipal corporation or agency thereof, selling water to the public for drinking and household purposes, shall take every reasonable precaution to protect from contamination and assure the healthfulness of such water; and any provisions in any charters heretofore granted to such persons, companies or municipal corporations in conflict with the provisions of this chapter are hereby repealed.

1899, c. 670, s. 1; 1903, c. 159, s. 1.

3028. Mayors to have concurrent jurisdiction. The mayor of each city or town having a public water supply shall have concur-

rent jurisdiction with any justice of the peace to hear and determine all violations of this chapter, provided such violation is within the jurisdiction of the justice of the peace.

1903, c. 159, s. 8.

3029. Condemnation of lands. All water companies operating under charters from the state or license from the municipalities, which may maintain public water supplies may acquire by condemnation such lands and rights in land and water as are necessary for the successful operation and protection of their plants, said proceedings to be the same as prescribed by law for acquiring right of way by railroad companies.

1903, c. 159, s. 16.

IV. FOR PUBLIC INSTITUTIONS.

3030. May enter upon lands to lay pipes, etc. For the purpose of providing water supplies, the directors or other lawful managers of any public institution of the state may enter upon the lands through which they may desire to conduct their pipes for the said purpose, and lay them under ground, and they, at all times, shall have the right to enter upon the said lands for the purpose of keeping the water line in repair and do all things necessary to that end.

1893, c. 63, s. 1.

3031. Compensation for land. If damages shall be claimed for the use of such lands and the parties can not agree as to the amount of compensation to be paid, they may proceed in the manner now provided by law for railroad companies to procure right of way.

1893, c. 63, s. 2.

CHAPTER 80.

WEIGHTS AND MEASURES.

| | Sections. |
|---------------------|-----------|
| I. Standards of, | 3032—3036 |
| II. State keeper, | 3037—3040 |
| III. County keeper, | 3041—3043 |
| IV. Surveyors, | 3044—3048 |

I. STANDARDS OF.

3032. To be used by traders; exception. No trader or other person shall buy or sell, or otherwise use in trading, any other weights and measures than are made and used according to the standard prescribed by the congress of the United States: Provided, that this chapter shall not prevent the citizens of the state from buying and selling grain by measure as may be agreed upon between the parties.

Code, s. 3837; R. C., e. 117, s. 1; 1741, e. 32. s. 2: 1866, e. 125.

3033. Provided by commissioners; branded. The board of commissioners of each county shall, at the charge of their county, procure standard sealed weights of half hundred, quarter hundred, ten pounds, five pounds, two pounds and one pound, one-half pound, one-quarter pound, two ounces, one ounce, one-half ounce, gauging rod and waist sticks, yard sticks, half bushel, peck, half peck, quarter peck, and one-eighth peck; gallon, half gallon, quart, pint, half pint, and gill measure, of the United States standard, sealed and branded "N. C."

Code, s. 3838; 1866-7, e. 126; 1881, e. 199.

3034. What is an acre of land. The measure of an acre of land shall be equal to a rectangle of sixteen poles or perches in length and ten in breadth, and shall contain one hundred and sixty square perches or poles, or four thousand eight hundred and forty square yards, six hundred and forty such acres being contained in a square mile.

Code, s. 3843; R. C., e. 117, s. 7; 33 Edw. I, e. 6.

3035. How many pounds to a bushel; penalty. A bushel of wheat shall be sixty pounds; of indian corn, fifty-six pounds; of corn meal, forty eight pounds; of bolted corn meal, forty-six pounds; of rye, fifty-six pounds; of barley, forty-eight pounds; of oats, thirty-

two pounds; of flax seed, fifty-five pounds; of clover seed, sixty pounds; of pease, sixty pounds; of rough rice, forty-four pounds; of buckwheat, fifty pounds; of peanuts, twenty-two pounds; of cotton seed, thirty pounds; but this section shall not be construed to prevent the purchase and sale by measure. If any person shall take any greater weight for one bushel of the several articles than is herein mentioned, he shall forfeit and pay the sum of twenty dollars for each separate case to any person who may sue for the same.

Code, ss. 3849, 3850; 1885, c. 26.

3036. Penalty for using untested. If any person, after demand by the standard-keeper for permission to examine and adjust the same, shall buy, sell, or barter by any weight or measure which shall not be tried by the standard, and sealed or stamped as aforesaid, he shall, for every such offense, forfeit and pay forty dollars; and if any person shall sell and deliver by less measure than the standard, he shall forfeit and pay for each offense forty dollars to the person suing therefor.

Code, s. 3842; 1893, c. 100.

II. STATE KEEPER.

3037. Appointed by governor; keeper of capitol, when. The governor is authorized to appoint a suitable person to take care of the balances, weights and measures, and perform the duties relating to weights and measures heretofore imposed on the governor, and such other duties as the governor may prescribe, touching said balances and weights and measures; and he shall take from such person a bond with surety, to be approved by the governor, in the penal sum of five hundred dollars for the safe-keeping of said weights and measures, and for the performance of all his duties. And in case the governor fails to appoint, or the person appointed fails to qualify or discharge said duties, the keeper of the capitol shall be ex officio the keeper of weights and measures, and discharge the duties and receive the compensation provided.

Code, s. 3844; 1866-7, res., p. 228; 1881, c. 199, s. 3.

3038. Duties of. It shall be the duty of the keeper of weights and measures, under the direction of the governor, to procure and furnish, at prime cost, to any of the counties, upon an order of the board of county commissioners, any of the standard sealed weights and measures required by law to be kept, and he is hereby authorized, by and with the approval of the governor, to contract for the manufacture of plain sealed weights substantially made of iron, steel or brass, as the county ordering may direct; yardstick made of

substantial wood, each end neatly covered with metal, sealed, marked and stamped "N. C.;" half bushel, peck, half peck, quarter peck, and one-eighth peck, made of substantial, well-seasoned wood, with secure metallic binding and casing; gallon, half gallon, quart, pint, half pint, and gill measure, made of light sheet copper with iron handles. He shall procure and furnish as herein provided to the board of commissioners of any county ordering the same, dry and liquid sealed measures and yardstick made of brass or copper.

Code, s. 3839; 1881, c. 199, s. 2.

3039. Must supply counties at their cost. It shall be the duty of the state standard-keeper to supply to each county, which shall call for the same, such standard weights as the standard-keeper of such county shall demand, duly sealed, such county paying to the state treasurer the actual cost of such weights, upon the certificate of the state standard-keeper.

Code, s. 3846; 1866-7, c. 126, s. 1.

3040. Record kept by. It shall be the duty of the state standard-keeper to keep a book, in which he shall keep an accurate account of all the weights and measures by him delivered, and the expenses incurred by him in the purchase of such weights and measures, subject to the inspection of the state treasurer and the general assembly.

Code, s. 3847; 1866-7, c. 126, s. 2.

III. COUNTY KEEPER.

3041. Appointed by commissioners; tenure; oaths. The weights and measures, stamps and brands thus provided, shall be kept at the courthouse of the respective counties by a standard-keeper, to be elected by the board of commissioners for the term of two years; and the person thus elected shall, before the board of county commissioners, take the oaths required for public officers and also an oath of office. But the standard-keeper may remove the weights and measures, stamps and brands from the courthouse, not to exceed sixty days in any one year, for the purpose of testing weights and measures throughout the county. This section shall not apply to the counties of Bladen, Gaston, Halifax, Lincoln, Montgomery, Moore, Northampton and Warren, and in these counties the office of standard-keeper is abolished.

Code, s. 3840; 1889, cc. 404, 513; 1891, c. 416; 1893, c. 207; 1901, c. 55; 1903, cc. 209, 595; R. C., c. 117, s. 4; 1741, c. 32, s. 3; 1816, c. 901, s. 2; 1827, c. 22, s. 3; 1883, c. 393.

Note. For bond of, see Bonds.

3042. May test every two years; penalty; exception. Every person using weights and measures and steelyards, embracing bal-

ances and other instruments used in weighing, shall allow and permit the standard-keeper of the county to try, examine and adjust by the standard at least once every two years all the said weights, measures, steelyards, embracing balances and other instruments used in weighing; and every trader or dealer by profession, and every miller, at least once in every two years thereafter, shall permit their weights, measures, steelyards, balances and other instruments used in weighing, to be examined and adjusted by the standard-keeper of the county in which such weights and measures are used, and the standard-keeper, when practicable, shall mark, by stamp or brand, the weights, measures, steelyards, balances and other instruments used in weighing found or made to agree with the standard, and shall give a certificate of such examination and adjustment, stating the weights, measures, steelyards, balances and other instruments used in weighing by him examined and adjusted; and every person using, buying or selling by weights and measures, who shall neglect to comply with the requisites of this section, shall forfeit fifty dollars, to be recovered at the instance of the standard-keeper, one-half to his use and the other half to the use of the county wherein the offense is committed. But in the counties of Camden and Currituck no such person shall be required to permit such examination and adjustment oftener than once in four years. This section shall not apply to the counties of Bladen, Gaston, Halifax, Lincoln, Montgomery, Moore, Northampton and Warren, and in these counties the office of standard-keeper is abolished.

Code, s. 3841; 1889, c. 404; 1891, c. 416; 1893, cc. 100, 207; 1901, c. 55; 1903, cc. 209, 595, 623; R. C., c. 117, s. 5; 1741, c. 32, ss. 4, 5; 1818, c. 965; 1823, c. 1226; 1866-7, c. 126, s. 3.

3043. Destroys weights and measures, when. In every instance where the standard-keeper shall have before him for adjustment, or shall find in the possession of any person, intending to use the same, any weight or measure that can not be adjusted so as to meet the requirements of the law, it shall be the duty of the standard-keeper to destroy the same.

Code, s. 3848; 1866-7, c. 126, s. 4.

IV. SURVEYORS.

3044. What is a surveyor's chain; tested. The standard measure for a surveyor's chain shall be twenty-two standard yards, a standard half or two-pole chain shall be eleven standard yards, a standard quarter or one-pole chain shall be five and one-half standard yards; but every person using a surveyor's chain, half chain or quarter chain for measuring land shall every year test the same in the manner hereinafter provided.

1889, c. 409; 1899, c. 665.

3045. Magnetic instruments and chains tested. Every surveyor operating in any of the counties of this state with magnetic instruments, whether in a public or private capacity, shall, between the first day of January and thirty-first day of December in each and every year, carefully test his needle upon the official meridian monuments in the county in which he resides or the nearest county in which such monuments have been erected, by adjusting his instrument over the intersection of the lines cut into the top of one of the meridian monuments so established and sighting to the intersection of the lines cut into the top of the other meridian monument, noting the variation of the magnetic from the true meridian and the direction thereof, and shall test the chain or other instrument of linear measure upon the distance from centre to centre as indicated by intersecting lines of the two beams, tablets or other official monuments set at or near the county courthouse for this purpose, noting the error of such instrument as compared with the standard of the monuments. On every official record of a survey of lands made after the first day of July, nineteen hundred and one, in any county in which meridian monuments have been erected, there shall be entered by the surveyor making such survey a record as to the date of testing the magnetic instrument used, and the amount of the declination or variation of the magnetic needle indicated at such test.

1899, c. 665, s. 1; 1901, c. 642.

3046. Instruments tested in another county. Before making surveys in any county other than the one in which the magnetic instruments and instruments for linear measure to be used have already been tested, said surveyor shall procure in writing from the register of deeds of the county in which said monuments have been established, nearest to the point where the survey is to be made, a statement giving the declination of the magnetic needle for the year in which it was last determined, and the rate and direction of the variation of said magnetic needle since that time, and this data shall be recorded as a part of the record of his survey. But no surveyor shall be required to go outside of the county in which he resides for the purpose of testing the instruments herein named.

1899, c. 665, s. 1.

3047. Tests returned to register of deeds; registered. Such tests and the correction, if any, resulting therefrom shall be returned by the surveyor in writing and under oath to the register of deeds for the county in which such meridian is situate within ten days from the taking of the observations, setting forth the name of the surveyor, his residence, the character of the instrument tested, the

date of the observations, the declination east or west of the magnetic needle from the true meridian, together with a fee of ten cents for filing and registering the same; and such return shall be filed and registered by the register of deed in a book properly ruled and lettered, to be furnished by the board of commissioners of the county, to be used for such purpose exclusively and entitled "The Meridian Record."

1899, c. 665, s. 1.

3048. Meridian monuments protected by county commissioners. It shall be the duty of the board of county commissioners to maintain and protect the meridian monuments and tablets or monuments for the testing of chains or other instruments of linear measure established by the state, or national surveys co-operating with the county authorities, in good order and condition as the official standards of the county.

1899, c. 665, s. 2.

NOTE. For defacing, removing or destroying meridian monuments, see Crimes. For compensation standard-keeper, see Salaries and Fees.

CHAPTER 81.

WIDOWS.

| | Sections. |
|-----------------------------|-----------|
| I. Dissent from will, | 3049—3051 |
| II. Dower, | 3052—3055 |
| III. Dower allotted, | 3056—3059 |
| IV. Year's support, | 3060—3064 |
| V. Year's support assigned, | 3065—3071 |
| VI. Increased allowance, | 3072—3079 |

I. DISSENT FROM WILL.

3049. How; when. Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months after the probate. The dissent may be in person, or by attorney authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court. If the widow be an infant or insane, she may dissent by her guardian.

Code, s. 2108; 1868-9, c. 93, s. 37.

3050. Effect of dissent. Upon such dissent, the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate.

Code, s. 2109; R. C., c. 118, s. 12; 1868-9, c. 93, s. 38.

3051. Not liable for husband's debts. The dower or right of dower of a widow, and such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, although she has not dissented from such will, shall not be subject to the payment of debts due from the estate of her husband, during the term of her life.

Code, ss. 2104, 2105; R. C., c. 118, s. 8; 1868-9, c. 93, s. 34; 1791, c. 351, s. 4.

II. DOWER.

3052. Who entitled to. Widows shall be endowed as at common law as in this chapter defined: Provided, if any married woman shall commit adultery, and shall not be living with her husband at his death, or shall be convicted of the murder of her husband, or being accessory before the fact to the murder of her husband, she shall thereby lose all right to dower in the lands and tenements of her husband; and any such adultery or conviction may be pleaded in bar of any action or proceeding for the recovery of dower.

Code, s. 2102; 1889, c. 499; 1868-9, c. 93, s. 32; 1871-2, c. 193, s. 44.

3053. Consists of what. Subject to the provision in the preceding section every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized at any time during the coverture, in which third part shall be included the dwelling-house in which her husband usually resided, together with offices, outhouses, buildings and improvements thereunto belonging or appertaining; she shall in like manner be entitled to such an estate in all legal rights of redemption and equities of redemption or other equitable estates in lands, tenements and hereditaments whereof her husband was seized in fee at any time during the coverture, subject to all valid incumbrances existing before the coverture or made during it with her free consent lawfully appearing thereto. The jury summoned for the purpose of assigning dower to a widow shall not be restricted to assign the same in every separate and distinct tract of land, but may allot her dower in one or more tracts, having a due regard to the interest of the heirs as well as to the right of the widow.

Code, s. 2103; R. C., c. 118, s. 3; R. S., c. 121, s. 3; 1827, c. 46; 1869-70, c. 176; 1883, c. 175.

3054. Husband's alienation does not bar, except to secure purchase-money. No alienation of the husband alone, with or without covenant of warranty, shall have any other or further effect than to pass his interest in such estate, subject to the dower right of his wife: Provided, that a mortgage or trust deed by the husband to secure the purchase-money, or any part thereof, of land bought by him, shall, without the wife executing the deed, be effectual to pass the whole interest according to the provisions of the said deed.

Code, s. 2106; 1868-9, c. 93, s. 35.

3055. Conveyed by joining in deed. The right to dower under this chapter shall pass and be effectual against any widow or person claiming under her upon the wife joining with her husband in the deed of conveyance and being privately examined as to her consent thereto in the manner prescribed by law.

Code, s. 2107; 1868-9, c. 93, s. 36.

Note. See chapter Married Women.

III. DOWER ALLOTTED.

3056. Assigned by agreement, when. If the personal property of a decedent be sufficient to pay his debts and charges of administration, the heir or devisee with the widow may, by deed, agree to an assignment of her dower.

Code, s. 2110; 1868-9, c. 93, s. 39.

3057. Application for. If no such agreement be made, the widow may apply for assignment of dower by petition in the superior court, and, if she fail to make such application within three months after the death of her husband, any heir or devisee may file a petition reciting the facts that the said widow is entitled to dower on certain lands and has not applied for it, and demand that her said dower be assigned to her. In all cases the widow and all heirs and devisees and persons in possession of, or claiming estates in, the lands shall be made parties, and the court shall hear and pass upon the petition in like manner as in other cases of special proceedings.

Code, ss. 2111, 2112; 1891, c. 133; 1868-9, c. 93, ss. 40, 41.

3058. How assigned. If dower be adjudged, it shall be assigned by a jury of three persons qualified to act as jurors, unless one of the parties demand a greater number, not exceeding twelve, who shall be summoned by the sheriff to meet on the premises or some part thereof, and being duly sworn by the sheriff or other person authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands within five days to

the clerk of the superior court. When the husband dies seized of lands in any other county than that in which dower is to be assigned, the clerk of the superior court of the county in which dower is to be assigned shall, upon application of the widow entitled to dower, issue a commission to the sheriff of such other county requiring him to summons three or more persons, as may be asked in said application, qualified to act as jurors, to go upon the lands of said husband in the county of said sheriff and assess the value of the same after being duly sworn by the sheriff for that purpose, and report their assessment under their hands and seals through the sheriff, who shall countersign the same as their report to the clerk issuing said commission; and said report in the hands of the jury summoned to assign the dower shall be considered by them a true valuation of the lands mentioned in the report, and said last-mentioned jury shall be deemed to have met on the lands thus assessed and shall assign the dower accordingly.

Code, s. 2113; 1893, c. 314; 1868-9, c. 93, s. 42.

3059. Notice to parties of meeting of jury. The parties to such proceeding, or their attorneys, if within the county, shall be notified of the time and place of meeting of the jury appointed to assign dower, at least five days before the meeting.

Code, s. 2114; 1868-9, c. 93, s. 43.

NOTE. For allotment in proceeds of sale for partition, see ss. 2507, 2515.

IV. YEAR'S SUPPORT.

3060. Who entitled. Every widow of an intestate, or of a testator from whose will she has dissented, shall be entitled, besides her distributive share in her husband's personal estate, to an allowance therefrom, for the support of herself and her family for one year after his decease, and said allowance shall be exempt from any lien, by judgment or execution, acquired against the property of her said husband: Provided, if any married woman shall commit adultery, and shall not be living with her husband at his death, or shall be convicted of the murder of her husband, or of being accessory before the fact to the murder of her husband, she shall thereby lose all right to a year's provision, and to a distributive share from the personal property of her husband, and such adultery or conviction may be pleaded in bar of any action or proceeding for the recovery of such rights and estates.

Code, s. 2116; 1889, c. 499, s. 2; 1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42.

3061. Value. Except in cases in which a larger allowance is hereinafter provided for, the value of a year's allowance shall be

three hundred dollars, and one hundred dollars in addition thereto for every member of the family besides the widow.

Code, s. 2118; 1868-9, c. 93, s. 10.

3062. Family defined. The family of the deceased, for the purposes of this chapter, shall be deemed to be, besides the widow, every child, either of the deceased or of the widow, and every other person to whom the deceased or widow stood in place of a parent, who was residing with the deceased at his death, and whose age did not then exceed fifteen years.

Code, s. 2119; 1868-9, c. 93, s. 11.

3063. If no widow, children entitled. If a man die intestate leaving no widow surviving him, or if his widow die before her year's allowance is assigned her, then there shall be assigned to every other member of the family, as in this chapter defined, the sum of one hundred dollars each, which shall be turned over immediately to the guardian and used by him in the care and education of the members of the family, respectively; and if there be no guardian, it shall be received and disbursed by the clerk of the superior court for their benefit.

1889, c. 496.

3064. From what assigned. Such allowance shall be assigned from the crop, stock and provisions of the deceased in his possession, at the time of his death, if there be a sufficiency thereof in value; and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased.

Code, s. 2117; 1868-9, c. 93, s. 9.

V. YEAR'S SUPPORT ASSIGNED.

3065. Personal representative shall assign. It shall be the duty of every administrator, collector, or executor of a will, from which the widow of a testator has dissented, on application in writing, signed by the widow of such intestate or testator, at any time within one year after the decease of the husband, to assign to her a year's allowance in the manner prescribed in this chapter, to the value herein prescribed, deducting therefrom the value of any articles consumed by the widow and her family since the death of her husband to the time of the assignment. If there be no widow, or if she should die before the year's provision is assigned, the personal representative shall assign one hundred dollars to every other member of the family as defined in this chapter; but if there be no personal representative it shall be assigned by a justice of the peace,

upon the application of the guardian or next friend of the children entitled.

Code, s. 2120; 1889, c. 496; 1868-9, c. 93, s. 12.

3066. Value ascertained. The value of stock, crop and provisions assigned to the widow, as well as that of the articles consumed, shall be ascertained by a justice of the peace and two persons qualified to act as jurors of the county in which administration was granted or the will proved.

Code, s. 2121; 1868-9, c. 93, s. 13.

3067. Procedure to assign. Upon the application of the widow, the personal representative of the deceased shall apply to a justice of the peace of the township in which the deceased resided, or some adjoining township, to summon two persons qualified to act as jurors, who, having been sworn by the justice to act impartially, shall, with him, ascertain the number of the family of the deceased according to the definition given in this chapter, and examine his stock, crop and provisions on hand, and assign to the widow so much thereof as will not exceed the value limited in this chapter, subject to the deduction prescribed in this chapter: Provided, that in case there shall be no administration upon said estate, or in the event that the personal representative shall fail or refuse to apply to a justice of the peace as aforesaid for the space of ten days after the widow shall have filed with him the application as aforesaid, or if the widow shall be the personal representative, she may make the application, and it shall be the duty of the justice to proceed in the same manner as though the application had been made by the personal representative: Provided further, that in all cases, if there be no crop, stock or provisions on hand, or not a sufficient amount, the commissioners may allot to the widow any articles of personal property of the deceased, and also any debt or debts known to be due him, and such allotment shall vest in the widow said property, and the right to collect the debts thus allotted: Provided further, that where the widow and personal effects of the deceased husband shall have been removed from the township or county where deceased husband resided before his death, the said widow may apply to any justice of the peace of any township or county where such personal property is located, and it shall be the duty of such justice to allot and assign the year's allowance as if the husband had resided and died in that township.

Code, s. 2122; 1891, c. 13; 1899, c. 531; 1870-1, c. 263.

3068. Duty of commissioners. The commissioners shall make and sign three lists of the articles assigned to the widow, stating the quantity and value of each, the number in the family, and the

deficiency to be paid by the personal representative. One of these lists shall be delivered to the widow, one to the personal representative and one returned by the justice, within twenty days after the assignment to the superior court of the county, and the clerk shall file and record the same and enter judgment against the personal representative, to be paid when assets shall come into his hands, for any residue found in favor of the widow.

Code, s. 2123; 1868-9, c. 93, s. 15.

3069. Appeal. The personal representative, or the widow, or infant by his guardian or next friend, or any creditor, legatee or distributee of the deceased, may appeal from the finding of the commissioners to the clerk of the superior court of the county, and, within ten days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding ten days after the service of the citation.

Code, s. 2124; 1897, c. 442; 1868-9, c. 93, s. 16.

3070. Duty of appellant. At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided as other issues are directed to be. When the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the commissioners.

Code, s. 2125; 1868-9, c. 93, s. 17.

3071. Allowance to widow a credit to personal representative. Upon the settlement of the accounts of the personal representative, he shall be credited with the articles assigned, and the value of the deficiency assessed as aforesaid, if the same shall have been paid, unless the allowance be impeached for fraud or gross negligence in him.

Code, s. 2126; 1868-9, c. 93, s. 18.

VI. INCREASED ALLOWANCE.

3072. When allowance in full. If the estate of a deceased be insolvent, or if his personal estate does not exceed two thousand dollars, the allowance for the year's support of his widow and her family shall not, in any case, exceed the value prescribed above; and the allowance made to her as above prescribed shall preclude her from any further allowance.

Code, s. 2127; 1868-9, c. 93, s. 19.

3073. Assigned on application to superior court. It shall not, however, be obligatory on a widow to have her support assigned as

above prescribed. Without applying to the personal representative of her deceased husband, she may, at any time within one year after the death of her husband, apply to the superior court of the county in which the will was proved, or administration granted, to have a year's support for herself and her family assigned to her.

Code, s. 2128; 1868-9, c. 93, s. 20.

3074. Proceeding; parties. The application shall be by summons, as is prescribed for special proceedings, in which the personal representative of the deceased, if there be one other than the plaintiff, the largest known creditor, or legatee, or some distributee of the deceased, living in the county, shall be made defendant; and the proceedings shall be as prescribed for special proceedings between parties.

Code, s. 2129; 1868-9, c. 93, s. 21.

3075. Complaint. In her complaint the widow shall set forth, besides the facts entitling her to a year's support and the value thereof, as claimed by her, the further facts that the estate of the deceased is not insolvent, and that the personal estate of which he died possessed exceeded two thousand dollars, and also whether or not she had an allowance made her, and the nature and value thereof; and if no allowance has been made, the quantities and values of the articles consumed by her and her family since the death of her husband.

Code, s. 2130; 1868-9, c. 93, s. 22.

3076. Judgment. If the material allegations of the complaint be found true, the judgment shall be that she is entitled to the relief sought; and the court shall thereupon issue an order to the sheriff or other proper officer of the county, commanding him to summon a justice of the peace and two indifferent persons qualified to act as jurors of the county, to assign to the plaintiff from the crop, stock and provisions of the deceased, a sufficiency for the support of herself and her family, for one year from the death of her husband; and if there be a deficiency thereof, to assess such deficiency, to be paid by the personal representative from the personal assets of the deceased, deducting, nevertheless, in all cases from such allowance the articles, or the value thereof, consumed by the widow and her family before such assignment, and also any sum previously assigned her.

Code, s. 2131; 1868-9, c. 93, s. 23.

3077. Duty of commissioners; report. The said commissioners shall be sworn by the justice and shall proceed as prescribed in this chapter, except that they may assign to the widow a value sufficient

for the support of herself and her family according to the estate and condition of her husband and without regard to the limitation aforesaid in this chapter; but the value allowed shall not in any case exceed the one-half of the annual net income of the deceased for three years next preceding his death. Their report shall be returned by the justice to the court.

Code, s. 2132; 1868-9, c. 93, s. 24.

3078. Exceptions by interested persons. The personal representative, or any creditor, distributee or legatee of the deceased, within twenty days after the return of the report, may file exceptions thereto. The plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty, and not less than ten days after service of the notice, and answer the same, the case shall thereafter be proceeded in, heard and decided as provided in special proceedings between parties.

Code, s. 2133; 1868-9, c. 93, s. 25.

3079. Confirmation; execution; costs. If the report shall be confirmed, the court shall so declare, and execution shall issue to enforce the judgment as in like cases.

Code, s. 2134; 1868-9, c. 93, s. 26.

CHAPTER 82.

WILLS.

| | Sections. |
|-------------------|-----------|
| I. Execution, | 3080—3083 |
| II. Revocation, | 3084—3087 |
| III. Witnesses, | 3088—3090 |
| IV. Probate, | 3091—3103 |
| V. Caveat, | 3104—3106 |
| VI. Construction, | 3107—3115 |

I. EXECUTION.

3080. Age of testators. No person shall be capable of disposing of real or personal estate by will, until he shall have attained the age of twenty-one years.

Code, s. 2137; R. C., c. 119, s. 2; 1811, c. 280.

3081. Married woman; proviso. A married woman owning real or personal property may dispose of the same by will.

Code, s. 2138; R. C., c. 119, s. 3; 1844, c. 88, s. 8.

3082. How executed. No last will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such last will shall have been written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the said estate, except as hereinafter provided; or, unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto, or inserted in some part of such will; and if such handwriting shall be proved, by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate.

Code, s. 2136; R. C., c. 119, s. 1; 1784, c. 204, s. 11; 1784, c. 225, s. 5; 1840, c. 62; 1846, c. 54.

3083. Execution of appointments by. No appointment, made by will in exercise of any power, shall be valid, unless the same be executed in the manner by law required for the execution of wills; and every will, executed in such manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Code, s. 2139; R. C., c. 119, s. 4; 1844, c. 88, s. 9.

II. REVOCATION.

3084. How written will revoked. No will or testament in writing, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force, until the same be burnt, canceled, torn, or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the tes-

tator, and his name subscribed thereto or inserted therein, and lodged by him with some person for safe-keeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least.

Code, s. 2176; R. C., c. 119, s. 22; 1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62.

3085. Revoked by marriage; exception. All wills shall be revoked by subsequent marriage of the maker except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his heirs, executor or administrator, or the person entitled as his next of kin, under the statute of distributions.

Code, s. 2177; R. C., c. 119, s. 23; 1844, c. 88, s. 10.

3086. Not revoked by altered circumstances. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

Code, s. 2178; R. C., c. 119, s. 24; 1844, c. 88, s. 11.

3087. Conveyance after execution does not. No conveyance or other act made or done subsequently to the execution of a will of, or relating to any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of, by will at the time of his death.

Code, s. 2179; R. C., c. 119, s. 25; 1844, c. 88, s. 2.

III. WITNESSES.

3088. Executors competent. No person, on account of being an executor of a will, shall be incompetent to be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Code, s. 2146; R. C., c. 119, s. 9.

3089. Devise. If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, estate, interest, legacy, or appointment of or affecting any real or personal estate shall be thereby given or made, such devise, estate, interest, legacy, or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person, or any person claiming under such person, or wife or husband, be void; and such person so attesting shall be admitted as

a witness to prove the execution of such will, or the validity or invalidity thereof.

Code, s. 2147; R. C., c. 119, s. 10.

3090. Witness dead, affidavits evidence, when. Whenever the subscribing witness to any will shall die, or be absent beyond the state, it shall be competent upon any issue of *devisavit vel non*, to give in evidence the affidavits and proofs taken by the clerk upon admitting the will to probate in common form, and such affidavit and proceedings before the clerk shall be *prima facie* evidence of the due and legal execution of said will.

1899, c. 680, s. 2.

IV. PROBATE.

3091. Executor may apply for. Any executor named in a will may, at any time after the death of the testator, apply to the clerk of the superior court, having jurisdiction, to have the same admitted to probate.

Code, s. 2151; C. C. P., s. 439.

3092. Executor failing, who may apply. If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days' notice thereof to the executor.

Code, s. 2152; C. C. P., s. 440.

3093. Production of will for, compelled. Every clerk of the superior court having jurisdiction, on application by affidavit setting forth the facts, shall, by summons, compel any person in the state, having in possession the last will of any decedent, to exhibit the same in his court for probate; and whoever being duly summoned refuses, in contempt of the court, to produce such will, or (the same having been parted with by him) refuses to inform the court on oath where such will is, or in what manner he has disposed of it, shall, by order of the clerk of the superior court, be committed to the jail of the county, there to remain without bail till such will be produced or accounted for, and due submission made for the contempt.

Code, s. 2154; C. C. P., s. 442.

3094. What shown on application. On application to the clerk of the superior court, he must ascertain by affidavit of the applicant:

1. That such applicant is the executor, devisee or legatee named in the will, or is some other person interested in the estate, and how so interested.

2. The value and nature of the testator's property, as near as can be ascertained.

3. The names and residences of all parties entitled to the testator's property, if known, or that the same on diligent inquiry can not be discovered; which of said parties in interest are minors, and whether with or without guardians, and the names and residences of such guardians, if known. Such affidavit shall be recorded with the will and the certificate of probate thereof, if the same is admitted to probate.

Code, s. 2153; C. C. P., s. 441.

3095. Proof and examination in writing. Every clerk of the superior court shall take in writing the proofs and examinations of the witnesses touching the execution of a will, and he shall embody the substance of such proofs and examinations, in case the will is admitted to probate, in his certificate of the probate thereof, which certificate must be recorded with the will. The proofs and examinations as taken must be filed in the office.

Code, s. 2149; C. C. P., s. 437.

3096. How admitted to probate. Wills and testaments must be admitted to probate only in the following manner:

1. In case of a written will, with witnesses, on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or reside out of the state, or can not after due diligence be found within the state, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will. In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the state, or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane or incompetent shall be sufficient. The probate of all wills heretofore taken in compliance with the requirements of this section are hereby declared to be valid.

2. In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of said witnesses, or of some other credible person, that such will

was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping.

3. In case of a nuncupative will, on the oath of at least two credible witnesses present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or from home. No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making; nor shall it be proved till a citation has been first issued or publication been made for six weeks in some newspaper published in the state, to call in the widow and next of kin to contest such will if they think proper.

Code, s. 2148; 1893, c. 269; 1901, c. 276; C. C. P., s. 435.

3097. How far probate conclusive. Such record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal.

Code, s. 2150; C. C. P., s. 438.

3098. Wills filed in clerk's office. All original wills shall remain in the clerk's office, among the records of the court, where the same shall be proved, and to the said wills any person may have access, as to the other records.

Code, s. 2173; R. C., c. 119, s. 19; 1777, c. 115, s. 59.

3099. Certified copy of will proved in another state. When a will, made by a citizen of this state, is proved and allowed in some other state or country, and the original will can not be removed from its place of legal deposit in such other state or country, for probate in this state, the clerk of the superior court of the county where the testator had his last usual residence or has any property, upon a duly certified copy or exemplification of such will being exhibited to him for probate, shall take every order and proceeding for proving, allowing and recording said copy as by law might be taken upon the production of the original.

Code, s. 2157; C. C. P., s. 445.

3100. Made out of state, how proven. Whenever it is suggested to the clerk of the superior court, by affidavit or otherwise, that a will has been made without the state, or that a will has been made in the state, and the witnesses thereto have moved out of the state, disposing of or charging land or other property within the state, the clerk of the superior court of the county where the property is situated may issue a commission to such person as he may select, author-

izing the commissioner to take the examination of such witnesses as may be produced, touching the execution thereof, and upon return of such commission, with the examination, he may adjudge the said will to be duly proved or otherwise, as in cases on the oral examination of witnesses before him, and if duly proved, such will shall be recorded.

Code, s. 2155; 1899, c. 55; C. C. P., s. 443.

3101. Where witnesses reside in different county, how proven.

When a will is offered for probate in one county of this state and the witnesses reside in another county, the clerk of the court before whom such will is offered shall have power and authority to issue a subpoena for said witnesses requiring them to appear before him and prove said will; and said clerk shall likewise have power and authority to issue a commission to take the deposition of said witnesses when they reside more than seventy-five miles from the place where the will is to be probated, such deposition and commission to be returned and the clerk to adjudge the will to be duly proven.

1899, c. 55.

3102. Nonresident's will, recorded; proof. Whenever any will made by a citizen or subject of any other state or country is duly proved and allowed in such state or country according to the laws thereof, a copy or exemplification of such will, duly certified and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States, or by any ambassador, minister, consul or commercial agent of the United States under his official seal when produced or exhibited before the clerk of the superior court of any county wherein any property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original and not the copy had been produced, proved and allowed before such clerk. But when any will contains any devise or disposition of real estate in this state, such devise or disposition shall not have any validity or operation, unless the will is executed according to the laws of this state; and that fact must appear affirmatively in the certified probate or exemplification of the will; and if it do not so appear, the clerk before whom the copy is exhibited shall have power to issue a commission for taking proofs, touching the execution of the will, as prescribed in the preceding section; and the same may be adjudged duly proved, and shall be recorded as herein provided.

Code, s. 2156; 1885, c. 393; C. C. P., s. 444; 1883, c. 144.

3103. Probates validated. In all cases of the probate of any will heretofore made in common form before any clerk of the superior

courts of this state, where the testimony of the subscribing witnesses has been taken in the state or out of it by any commissioner appointed by said clerk or taken by any other clerk of the superior court in any other county of this state, and the will admitted to probate upon such testimony, the proceedings are validated.

1899, c. 680.

V. CAVEAT.

3104. When and how filed. At the time of application for the probate of any will, or at any time thereafter, as prescribed by law, any person entitled under such will or interested in the estate may appear in person or by attorney before the clerk of the superior court, and enter a caveat to the probate of such will.

Code, s. 2158; C. C. P., s. 446.

3105. Cause transferred to trial docket, when. Upon any caveator giving bond, with sufficient surety to be approved by the clerk, in the sum of two hundred dollars, payable to the propounder of the will, conditioned to pay all costs which may be adjudged against such caveator in the superior court, by reason of his failure to prosecute his suit with effect, or deposit the money or give a mortgage in lieu of such bond, or shall file affidavits and satisfy the said clerk of his inability to give such bonds or secure such costs, the clerk shall transfer the cause to the superior court for trial; and he shall also forthwith issue a citation to all devisees, legatees or other parties in interest within the state, and cause publication to be made, for six weeks, in some newspaper printed in the state, for nonresidents to appear at the term of the superior court, to which the proceeding is transferred, and to make themselves proper parties to the said proceeding, if they choose. At the term of said court to which such proceeding is transferred, or as soon thereafter as motion to that effect shall be made by the propounder, and before trial, the judge shall require any of the persons so cited, either those who make themselves parties with the caveators, or whose interest appear to him antagonistic to that of the propounders of the will, and who shall appear to him to be able so to do, to file such bond within such time as he shall direct and before trial, and on failure to file said bond the judge shall dismiss the proceeding.

Code, s. 2159; 1899, c. 13; 1901, c. 748; C. C. P., s. 447.

3106. Filing of, suspends proceedings under will. Where a caveat is entered and bond given, the clerk of the superior court shall forthwith issue an order to any personal representative, having the estate in charge, to suspend all further proceedings in relation

to the estate, except the preservation of the property and the collection of debts, until a decision of the issue is had.

Code, s. 2160; C. C. P., s. 448.

VI. CONSTRUCTION.

3107. Devise presumed a fee simple. When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity.

Code, s. 2180; R. C., c. 119, s. 26; 1784, c. 204, s. 12.

3108. Valid only after probate; conclusiveness of probate. No will shall be effectual to pass real or personal estate, unless it shall have been duly proved and allowed in the probate court of the proper county, and a duly certified copy thereof shall be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclusive as to the execution thereof, against the heirs and devisees of the testator, whenever the probate thereof, under the like circumstances, would be conclusive against the next of kin and legatees of the testator.

Code, s. 2174; R. C., c. 119, s. 20; 1784, c. 225, s. 6.

3109. What property passes by will. Any testator, by his will duly executed, may devise, bequeath, or dispose of all real and personal estate, which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law, or upon his executor or administrator; and the power hereby given shall extend to all contingent, executory, or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons, in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to, at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Code, s. 2140; R. C., c. 119, s. 5; 1844, c. 88, s. 1.

3110. Speak as of death of testator. Every will shall be construed with reference to the real and personal estate comprised

therein, to speak and take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Code, s. 2141; R. C., c. 119, s. 16; 1844, c. 88, s. 3.

3111. Lapsed and void devises pass under residuary clause.

Unless a contrary intention shall appear by the will such real estate or interest therein, as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

Code, s. 2142; R. C., c. 119, s. 7; 1844, c. 88, s. 4.

3112. General gift includes estate to which testator has power to appoint.

A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

Code, s. 2143; R. C., c. 119, s. 8; 1844, c. 88, s. 5.

3113. Gifts to children dying, pass to issue. When any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person as shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportions and estates as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Code, s. 2144; 1868-9, c. 113, s. 61.

3114. Void as to after-born child. Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of said parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in this chapter.

Code, s. 2145; 1868-9, c. 113, s. 62.

3115. Administrator c. t. a. must observe will. In all cases where letters of administration with the will annexed are granted, the will of the testator must be observed and performed by the administrator with the will annexed, both in respect to real and personal property, and an administrator with the will annexed has all the rights and powers, and is subject to the same duties as if he had been named executor in the will.

Code, s. 2168; C. C. P., s. 455.

CHAPTER 83.

WRECKS.

(Sections 3116—3129.)

3116. Number and boundaries of wreck districts. The counties of Currituck, Dare, Hyde, Carteret, Onslow, Brunswick and New Hanover are hereby divided into the following wreck districts, namely:

Currituck.—The first to extend from the Virginia state line to Judy's cove; the second to extend from Judy's cove to Josephus Baum's fish-house; the third to extend from Josephus Baum's fish-house to the county line of Dare.

Dare.—The first to extend from the county line of Currituck to the north point of Oregon inlet; the second to extend from the north point of Oregon inlet to the south point of New inlet; the third to extend from south point of New inlet to the patrol house between Gull Shoal and Little Kennakeet Life-Saving Stations; the fourth to extend from the last named patrol house to the patrol house between Big Kennakeet and Cape Hatteras Life-Saving Stations; the fifth to extend from the last named patrol house to Creed's Hill

Life-Saving Stations; sixth to extend from Creed's Hill Life-Saving Stations to the county line of Hyde county.

Hyde.—First to extend from Dare county line to the eastern point of the Great Swash; second to extend from the eastern point of the Great Swash to the Carteret county line.

Carteret.—The first from the Hyde county line to Core Banks Life-Saving Station; the second from Core Banks Life-Saving Station to Old Topsail inlet; the third from Old Topsail inlet to the Onslow county line.

Onslow.—The first from Bogue inlet to New river inlet; the second from New River inlet to the New Hanover county line.

New Hanover.—The first to extend from Onslow county line to Deep inlet; the second from Deep inlet to the Brunswick county line.

Brunswick.—The first to extend from New inlet to Lockwood's Folly; the second from Lockwood's Folly to the South Carolina line.

1899, c. 79, ss. 1-9; 1903, c. 85.

3117. Commissioners of wrecks, how appointed. The governor, on the first day of April, one thousand nine hundred and five, and every two years thereafter, shall appoint a commissioner of wrecks, for each of the districts designated in the preceding section. Each commissioner shall reside in the district for which he is appointed, unless separated by navigable waters, in which case the distance shall not exceed three miles. The restrictions as to residence shall not apply to Hyde county. No person who holds any office of profit or trust under the laws of the United States or the state of North Carolina, nor any person who is a pilot shall hold the office of commissioner of wrecks. The term of office shall be for two years.

1899, c. 79, ss. 10, 12, 13; 1903, c. 85.

3118. Wreck commissioner to take oath of office. Every person appointed as commissioner of wrecks, before entering upon the duties of his office, shall go before some officer duly authorized to administer oaths and take an oath to faithfully perform the duties of his office, and the oaths to support the constitution of the state and of the United States.

1899, c. 79, s. 11.

3119. Duty of commissioner. Upon the earliest intelligence given that any ship or vessel is stranded, it shall be the duty of the commissioner in whose district the same is stranded, or his duly authorized agent, to proceed at once to such wreck, and upon the permission of the master of such wrecked ship, or other stranded vessel, the said commissioner or agent shall immediately proceed to summon

a sufficient number of men who, under the direction of the commissioner acting, shall at once proceed to save the cargo and material of such wrecked vessel. After any such goods or stranded property shall have been saved, the said goods shall be immediately placed under guard, one guard to be selected by the commissioner or owner representing the same, and one other guard to be selected by the salvors saving the same. And such goods or stranded property shall be kept under strict guard until sold or the salvors are paid as provided in this chapter.

1899, c. 79, s. 14; 1901, c. 178.

3120. Salvage paid; property remains in custody until paid.

Each and every person who assists in saving such cargo or material shall, within thirty days after saving the same, be paid a reasonable reward by the owner or master of such vessel, or by the merchant whose vessel or goods shall be saved. In default of payment of a reasonable compensation, as provided in the preceding section, the goods or property so saved shall remain in the joint custody of the commissioner and salvors until all reasonable charges be paid, or security given for that purpose to the satisfaction of the parties saving such goods or other property.

1899, c. 79, ss. 14, 15.

3121. How salvage fixed on disagreement. If the parties shall disagree touching the amount of reward or salvage to be paid to the persons employed, the commander, owner or commissioner who are representing the same shall choose one disinterested person, and also the salvors shall nominate one other, who shall adjust and ascertain the same; and if the persons thus chosen can not agree, they shall choose one other indifferent person as umpire to decide between them.

1899, c. 79, s. 16.

3122. When and how wrecked property sold for salvage. If the owner of the vessel, or the property which has been saved, shall fail for thirty days after the salvage has been ascertained either by agreement or as provided for in the preceding section to pay such salvage, it shall be the duty of the commissioner of wrecks in charge of such property to sell at public outcry such stranded or wrecked vessel or other property; first advertising the same as for sales of personal property under execution. Each commissioner shall provide himself with books and shall record in them all such sales by him made, and every commissioner shall receive for selling any such wrecked or stranded property five per centum on the amount of sales. At any public sale of stranded property, the salvors may select one person, and the commissioner one other, who shall keep an accurate

account of the sales, make the collections and settle with the commissioner his fees and pay to the salvors the amount agreed on or awarded by the referees.

1899, c. 79, s. 17; 1901, c. 178.

3123. When goods removed without sale; fees of commissioner. If any owner or merchant shall remove any such goods or stranded property from the custody of any commissioner without a sale, then such commissioner shall receive two and one-half per centum on the amount of the value of such property, which amount shall be ascertained in the same manner as provided for ascertaining the amount to be paid salvors as provided in this chapter. No commissioner shall receive any salvage or reward except his commission as prescribed in this chapter.

1899, c. 79, ss. 17, 18.

3124. Unclaimed property, how sold. Whenever any vessel, cargo or material of any ship or vessel or any other property shall be cast ashore or taken up at sea and brought to shore, and no person is present to elaim the same as owner, it shall be the duty of the commissioner in whose district the same is brought or cast ashore to take charge of the same and to proceed to advertise and sell the same at public sale, first giving twenty days' notice at three public places; and after all such sales made by any commissioner of wrecks, he shall retain in his hands the amount awarded to the salvors, as provided in this chapter and said commissioner shall also receive five per centum as his commission out of the gross amount of such sales.

1899, c. 79, ss. 19, 20.

3125. Proceeds of unclaimed property paid to clerk superior court. When any commissioner shall undertake to sell any property where no person is or has been present to claim the same, it shall be his duty to notify the clerk of the superior court of such sale; and after all such sales made, said commissioner shall forward to the clerk of the superior court of his county the proceeds of such sale, after having deducted his commission of five per centum and paying the salvors the amount awarded to them as provided in this chapter.

1899, c. 79, s. 21.

3126. Clerk to advertise for owner; if not claimed, how funds paid. It shall be the duty of the clerk of the superior court to make a record and keep an account of all moneys received by him from any commissioner of wrecks, and he shall advertise in some weekly newspaper published in North Carolina the amount so received, giv-

ing a true description of the marks, numbers and kinds of goods or other stranded property for which the same was sold. Each commissioner shall give the clerk of the superior court all necessary information for the proper enforcement of this section in each return made by them to the clerk; and the clerk shall advertise for the space of sixty days, and if no person shall come to claim the same within a year and a day from the date of advertisement, then the clerk holding such money shall transmit the same, after deducting one per centum for his trouble and also after deducting the cost of advertising, to the treasurer of the state for the benefit of the public school funds.

1899, c. 79, s. 22.

3127. How ownership of fund proven. If any person shall claim to be the owner of any property sold as provided in the preceding section and shall present his claim to any clerk holding such moneys, it shall be the duty of such person to prove his title to the satisfaction of any clerk holding such money. If any person making a claim to such property be unknown to the clerk, then the said clerk shall submit such claim to the consideration of three disinterested persons, one of whom shall be chosen by said claimant, and the decision of said referees shall always be final.

1899, c. 79, s. 23.

3128. Stranded property when found, reported. If any person shall find any wrecked or stranded property on or near the seashore, and no person being present to claim the same, he shall as soon as possible give information to the nearest commissioner of wrecks, who shall advertise and sell the same as provided in this chapter.

1899, c. 79, s. 24.

3129. Expenses deducted from proceeds of sales. All necessary expenses shall be deducted from the gross proceeds of any sales made under this chapter. The necessary expenses, as provided in this section, shall include only the cost of advertising, guarding and surveying, when any such survey may have been called by a notary public, as is provided by the Revised Statutes of the United States.

1899, c. 79, s. 19.

NOTE. For bond of commissioner, see Bonds, s. 268a.
For penalty for violating this chapter, see Crimes.

CHAPTER 84.

CRIMINAL PROCEDURE.

| | Sections. |
|----------------------------|-----------|
| I. General provisions, | 3130—3138 |
| II. Warrants, | 3139—3145 |
| III. Search warrants, | 3146—3147 |
| IV. Peace warrants, | 3148—3158 |
| V. Arrest, | 3159—3165 |
| VI. Fugitives, | 3166—3172 |
| VII. Preliminary hearing, | 3173—3188 |
| VIII. Bail, | 3189—3195 |
| IX. Forfeited bail, | 3196—3211 |
| X. Commitment, | 3212—3214 |
| XI. Venue, | 3215—3221 |
| XII. Presentment, | 3222—3223 |
| XIII. Indictment, | 3224—3236 |
| XIV. Trial before justice, | 3237—3242 |
| XV. Trial, superior court, | 3243—3253 |
| XVI. Appeal, | 3254—3263 |
| XVII. Execution, | 3264—3266 |

I. GENERAL PROVISIONS.

3130. Limitations, indictments for misdemeanor. All misdemeanors, except the offenses of perjury, forgery, malicious mischief, and other malicious misdemeanors, deceit, and the offense of being accessory after the fact, now made a misdemeanor, shall be presented or found by the grand jury within two years after the commission of the same and not afterwards: Provided, that in case any of the said misdemeanors, hereby required to be prosecuted within two years, shall have been committed in a secret manner, the same may be prosecuted within two years after the discovery of the offender: Provided further, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the state.

Code, s. 1177; R. C., c. 35, s. 8; 1826, c. 11.

3131. When criminal process issued and returned. All process, warrants and precepts, issued by any judge or justice of the peace, or clerk of any court, on any criminal prosecution, may issue at any time, and be made returnable to any day of the term of the court, to which such warrant, process, or precept is returnable.

Code, s. 1178; R. C., c. 35, s. 9; 1777, c. 115, s. 15.

3132. Process, how endorsed. Every sheriff or other officer shall indorse on all process and subpœnas issuing in criminal cases,

whether for the state or defendant, the day when such process and subpoenas came to hand, and also the day of their execution; and on failure of any sheriff or other officer to perform either of said duties he shall forfeit and pay the sum of ten dollars for every case of neglect, to be recovered for the use of the state, in the same manner as forfeitures are recovered against sheriffs by parties in civil suits for failure to make due return of process delivered to them.

Code, s. 1179; R. C., c. 35, s. 10; 1850-1, c. 57.

3133. Accused entitled to counsel. Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense.

Code, s. 1182; R. C., c. 35, s. 13; 1777, c. 115, s. 85.

3134. Where persons may be imprisoned. No person shall be imprisoned by any judge, court, justice of the peace, or other peace officer except in the common jail of the county, unless otherwise provided by law: Provided, that whenever the sheriff of any county shall be imprisoned, he may be imprisoned in the jail of any adjoining county.

Code, s. 1174; R. C., c. 35, s. 6; 1797, c. 474, s. 3; 1879, c. 12.

3135. Who may direct post-mortem examination. In all cases of homicide, any officer prosecuting for the state may, at any time, direct a post-mortem examination of the deceased to be made by one or more physicians to be summoned for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs, and if not collected out of the defendant the same shall be paid by the county.

Code, s. 1214; R. C., c. 35, s. 49.

3136. Stolen property returned to owner. Upon the conviction of any felon for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels or other estate were robbed or stolen, shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise, as may be necessary for that purpose.

Code, s. 1201; R. C., c. 35, s. 34; 21 Hen. VIII., c. 11.

3137. Magistrate may associate another with him. It shall be lawful for any magistrate, to whom any complaint may be made, or before whom any prisoner may be brought, as by law provided, to

associate with himself any other magistrate of the same county; and the powers and duties herein mentioned may be executed by such two magistrates so associated.

Code, s. 1159; 1868-9, c. 178, subc. 3, s. 28.

3138. Commitments for felonies, when tried or discharged.

When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the state could not be produced at the same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment.

Code, s. 1658; 1868-9, c. 116, s. 33.

NOTE. Pleadings incompetent in criminal proceedings, see s. 454.

II. WARRANTS.

3139. Who may issue. The following persons respectively shall have power to issue process for the apprehension of persons charged with any offense, and to execute the powers and duties conferred in this chapter, namely: The chief justice and the associate justices of the supreme court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns.

Code, s. 1132; 1868-9, c. 178, subc. 3, s. 1.

3140. Complainant examined on oath. Whenever complaint shall be made to any such magistrate that a criminal offense has been committed within this state, or without this state and within the United States, and that a person charged therewith is in this state, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him.

Code, s. 1133; 1868-9, c. 178, subc. 3, s. 2.

3141. When to issue; contains what; to whom directed. If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer, to whom it shall be directed (the justice of the peace or a chief officer of a city or town shall direct his warrant to the

sheriff or other lawful officers of his county), forthwith to take the person accused of having committed such offense, and bring him before a magistrate, to be dealt with according to law.

Code, s. 1134; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 3.

3142. Where to run. Warrants issued by any justice of the supreme court, or by any judge of the superior court, or of a criminal court, may be executed in any part of this state; warrants issued by a justice of the peace, or by the chief officer of any city or incorporated town, may be executed in any part of the county of such justice, or in which such city or town is situated, and on any river, bay or sound forming the boundary between that and some other county, and not elsewhere, unless indorsed as prescribed in the section following.

Code, s. 1135; 1868-9, c. 178, subc. 3, s. 4.

3143. How endorsed; what officer compelled to serve. If the person against whom any warrant shall be issued by any justice of the peace or chief officer of a city or town shall escape, or be in any other county out of the jurisdiction of such justice or chief officer, it shall be the duty of any justice of the peace, or any other magistrate within the county where such offender shall be, or shall be suspected to be, upon proof of the handwriting of the magistrate or chief officer issuing the warrant, to indorse his name on the same, and thereupon the person, or officer to whom the warrant was directed, may arrest the offender in that county. The justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officers of his county, and such warrant when endorsed as herein prescribed shall authorize and compel the sheriff or other officer of any county in the state, in which such endorsement is made, to execute the same.

Code, s. 1136; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 5.

3144. Magistrate endorsing, not liable to action. No magistrate shall be liable to any indictment, action for trespass or other action for having indorsed any warrant pursuant to the provisions of the last section, although it should afterward appear that such warrant was illegally or improperly issued.

Code, s. 1137; 1868-9, c. 178, subc. 3, s. 6.

3145. Before what magistrate returnable. Persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant; or, if he be absent, or from any cause unable to try the case, before the nearest magistrate in the same county; and the warrant, by virtue of which the arrest shall have been made, with

a proper return indorsed thereon and signed by the officer or person making the arrest, shall be delivered to such magistrate.

Code, s. 1143; 1868-9, c. 178, subc. 3, s. 12.

III. SEARCH WARRANTS.

3146. How issued; when to run. If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the state of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town, to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession, or on whose premises may be found such stolen property, counterfeit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law.

Code, s. 1171; 1868-9, c. 178, subc. 3, s. 38.

3147. Form of, and procedure thereon. Such search warrant shall describe the article to be searched for with reasonable certainty, and by whom the complaint is made, and in whose possession the article to be searched for is supposed to be; it shall be made returnable as other criminal process is by law required to be, and the proceedings thereupon shall be as required in other cases of criminal complaint.

Code, s. 1172; 1868-9, c. 178, subc. 3, s. 39.

NOTE. For search warrant for seamen, see Crimes, s. 3509.

IV. PEACE WARRANTS.

3148. Who may issue. The following magistrates shall have power to cause to be kept all the laws made for the preservation of the public peace, and in execution of that power to require persons

to give security to keep the peace, in the manner provided in this chapter, namely: The chief justice and associate justices of the supreme court, the judges of the superior and criminal courts, and of any special courts which may hereafter be created, the justices of the peace, the mayors or other chief officers of all cities and towns.

Code, s. 1216; 1868-9, c. 178, subc. 2, s. 1.

3149. Complaint to obtain. Whenever complaint shall be made in writing, and upon oath, to any such magistrate that any person has threatened to commit any offense against the person or property of another, it shall be the duty of such magistrate to examine such complainant and any witnesses who may be produced on oath, to reduce such examination to writing, and to cause the same to be subscribed by the parties so examined.

Code, s. 1217; 1868-9, c. 178, subc. 2, s. 2.

3150. When to issue. If it shall appear from such examination that there is just reason to fear the commission of any such offense by the person complained of, it shall be the duty of the magistrate to issue a warrant under his hand, with or without a seal, reciting the complaint, and commanding the officer to whom it is directed forthwith to apprehend the person so complained of, and bring him before such magistrate or some other magistrate authorized to issue such warrant.

Code, s. 1218; 1868-9, c. 178, subc. 2, s. 3.

3151. Breach of peace in presence of court. Every person who, in the presence of any magistrate specified in section thirty-one hundred and forty-eight, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offense against his person or property; and all persons who, in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court, without any other proof, to give such security as above specified, and in case of failure so to do, may be committed as above provided.

Code, s. 1224; 1868-9, c. 178, subc. 2, s. 9.

3152. To whom directed. The warrant shall be directed to the sheriff, coroner or any constable, each of whom shall have power to execute the same within his county; and if no sheriff, coroner or constable can conveniently be found, the warrant may be directed to any person whatever, who shall have power to execute the same within the county in which it is issued. No justice of the peace, or mayor, or other chief officer of any city or town shall direct his warrant to any officer outside the county of said justice or chief officer.

Code, s. 1219; 1868-9, c. 178, subc. 2, s. 4.

3153. Proceeding on. Whenever any person complained of on a peace warrant shall be brought before a justice of the peace, such person may be required to enter into a recognizance, payable to the state of North Carolina, in such sum, not exceeding one thousand dollars, as such justice shall direct, with one or more sufficient sureties, to appear before some justice of the peace within a period not exceeding six months, and not depart the court without leave, and in the meanwhile to keep the peace and be of good behavior towards all the people of the state, and particularly towards the person requiring such security.

Code, ss. 894, 1220; 1879, c. 92, s. 9.

3154. When accused discharged. If the complainant does not appear, the party recognized shall be discharged, unless good cause be shown to the contrary. If the respective parties appear, the court shall hear their allegations and proofs, and may either discharge the recognizance taken, or they may require a new recognizance, as the circumstances of the case may require, for such time as may appear necessary, not exceeding one year.

Code, s. 1226; 1868-9, c. 178, subc. 2, s. 12.

3155. When defendant imprisoned. If such recognizance shall be given, the party complained of shall be discharged; if such person shall fail to find such security, it shall be the duty of the magistrate to commit him to prison until he shall find the same, specifying in the mittimus the cause of commitment and the sum in which such security was required.

Code, s. 1221; 1868-9, c. 178, subc. 2, s. 6.

3156. Defendant may appeal. In all proceedings on peace warrants the defendant may appeal from the decision of the justice of the peace to the superior court by giving the bond required by the justice of the peace to keep the peace, in addition to the appeal bond, when the case shall be heard by the judge holding the court in the county.

1901, c. 66.

3157. How discharged after imprisonment. Any person committed for not finding sureties of the peace as above provided, may be discharged by any magistrate upon giving such security as was originally required of such person, or by a justice of the supreme court, or judge of the superior or criminal court, by giving such other security as may seem sufficient.

Code, s. 1222; 1868-9, c. 178, subc. 2, s. 7.

3158. When and where recognizance returned. Every recognizance taken pursuant to the foregoing provisions shall be transmitted

by the magistrate taking the same to the next term of the superior, criminal or inferior court for the county in which the offense is charged to have been committed.

Code, s. 1223; 1868-9, c. 178, subc. 2, s. 8.

V. ARREST.

3159. Who may, for breach of peace, without warrant. Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders.

Code, s. 1124; 1868-9, c. 178, subc. 1, s. 1.

3160. Who may, for felony, without warrant. Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense, and it shall be the duty of every sheriff, coroner, constable or officer of police, upon information, to assist in such arrest.

Code, s. 1129; 1868-9, c. 178, subc. 1, s. 6.

3161. Officer may, without warrant, when. Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest.

Code, s. 1126; 1868-9, c. 178, subc. 1, s. 3.

3162. Who may break house to prevent a felony. All persons are authorized to break open and enter a house to prevent a felony about to be committed therein.

Code, s. 1127; 1868-9, c. 178, subc. 1, s. 4.

3163. Officer may break and enter houses. If a felony or other infamous crime has been committed, or a dangerous wound has been given, and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief.

Code, s. 1128; 1868-9, c. 178, subc. 1, s. 5.

3164. Who compelled to assist. Every person summoned by a judge, justice, mayor, intendant, chief officer of any incorporated

town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offenses, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so.

Code, s. 1125; 1868-9, c. 178, subc. 1, s. 2.

3165. Procedure on. Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law.

Code, s. 1130; 1868-9, c. 178, subc. 1, s. 7.

NOTE. For punishment for failure to aid officer in making arrest, see Crimes, s. 3646.

VI. FUGITIVES.

3166. Felons fleeing from justice, outlawed. In all cases where any two justices of the peace, or any judge of the supreme, superior or criminal courts, shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest, and service of the usual process of the law, the said judge, or the said two justices, being justices of the county wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring the sheriff of any county in the state in which said fugitive shall be, and when issued by two justices, empowering and requiring the sheriff of the county of said justices, to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation hath been thus issued, continue to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the state may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime.

Code, s. 1131; 1868-9, c. 178, subc. 1, s. 8; 1866. c. 62.

3167. From another state, how arrested and held. Any justice of the supreme court, or any judge of the superior court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive or other person in the state has committed, out of the state and within the United States, any offense which, by law of the state in which the offense was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, shall have full power and authority, and is hereby required to issue a warrant for said fugitive or other person and commit him to any jail within the state for the space of six months, unless sooner demanded by the public authorities of the state wherein the offense may have been committed, pursuant to the act of Congress in that case made and provided. If no demand be made within that time the said fugitive or other person shall be liberated, unless sufficient cause be shown to the contrary.

Code, s. 1165; 1895, c. 103; 1868-9, c. 178, subc. 3, s. 34.

3168. Magistrate to keep record; transmit copy to governor. Every magistrate committing any person under the preceding section, shall keep a record of the whole proceedings before him, and immediately transmit a copy thereof to the governor for such action as he may deem fit therein under the law.

Code, s. 1166; 1868-9, c. 178, subc. 3, s. 35.

3169. Duty of governor. The governor shall immediately inform the governor of the state or territory in which the crime is alleged to have been committed, or the president of the United States, if it be alleged to have been committed within the District of Columbia, of the proceedings had in such case.

Code, s. 1167; 1868-9, c. 178, subc. 3, s. 36.

3170. Surrendered on order of governor. Every sheriff or jailer, in whose custody any person so committed shall be, upon the order of the governor, shall surrender him to the person named in such order.

Code, s. 1168; 1868-9, c. 178, subc. 3, s. 37.

3171. Governor may employ agents, and offer rewards for arrest of. The governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a felony or other infamous crime within the state, and of having fled out of the jurisdiction thereof, or who conceals himself within the state to avoid arrest, or who, having been convicted, has escaped and can not otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend

such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed; and he may from time to time issue his warrants on the state treasurer for sufficient sums of money for such purpose.

Code, s. 1169; 1891, c. 421; R. C., c. 35, s. 4; 1800, c. 561; 1866, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29.

3172. Expenses of bringing from another state, paid. In all cases where the governor of the state has made a requisition on the governor of another state for any fugitive from justice and has sent an agent to receive said fugitive, it shall be lawful for the governor to issue a warrant on the state treasurer for the amount of money necessary to pay the expenses of said agent and other costs in the arresting of said fugitive from justice, to be paid by the treasurer of the state.

Code, s. 1170; 1870-1, c. 82.

VII. PRELIMINARY HEARING.

3173. Waiver of examination; bail. If any person arrested shall desire to waive examination and give bail, it shall be the duty of the officer making the arrest to take him before any magistrate of the county in which the offense is charged to have been committed, or before any judge of the supreme or superior court. If the offense charged in the warrant be not punishable with death, such magistrate may take from the person so arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offense shall be alleged to have been committed.

Code, ss. 1138, 1139; 1868-9, c. 178, subc. 3, ss. 7, 8.

3174. Procedure, when justice has not final jurisdiction. In all cases where a justice of the peace shall not have final jurisdiction of the offense, he shall desist from any final determination of the action or complaint, and proceed as hereinafter provided.

Code, s. 896; 1868-9, c. 178, subc. 4, s. 7; 1879, c. 302, s. 2.

3175. Duty of examining magistrate. The magistrate, before whom any such person shall be brought, shall proceed, as soon as may be, to examine the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge, which such magistrate may deem pertinent. The

defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel.

Code, ss. 1144, 1145; 1868-9, c. 178, sube. 3, s. 13.

3176. Testimony reduced to writing; right to counsel. The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution.

Code, ss. 1146, 1150; 1868-9, c. 178, sube. 3, ss. 14, 19.

3177. Prisoner examined; advised of rights. The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings.

Code, ss. 1145, 1146; 1868-9, c. 178, sube. 3, ss. 14, 15.

3178. Witnesses not to be present at examination of prisoner. The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner; and while any witness is under examination the magistrate may exclude from the place in which such examination is had all witnesses who have not been examined, and may cause the witnesses to be kept separate and prevented from conversing with each other until they shall have been examined.

Code, s. 1149; 1868-9, c. 178, sube. 3, s. 18.

3179. Answers reduced to writing, read to prisoner, signed by magistrate. The answer of the prisoner to the several interrogatories shall be reduced to writing by the magistrate, or under his direction. They shall be read to the prisoner, who may correct or add to them; and when made conformable to what he declares is the truth, shall be certified and signed by the magistrate.

Code, s. 1147; 1868-9, c. 178, sube. 3, s. 16.

3180. Witnesses for defendant examined. After the examination of the prisoner is complete, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination.

Code, s. 1148; 1868-9, c. 178, sube. 3, s. 17.

3181. Examination not necessary in misdemeanors. Nothing contained in the preceding sections shall be construed to require any magistrate, before whom a prisoner charged with a misdemeanor shall be brought, to take the examination of such prisoner, except where such magistrate shall deem it material so to do, or where such examination shall be required by the prisoner.

Code, s. 1153; 1868-9, c. 178, subc. 3, s. 22.

3182. When prisoner discharged. If, upon examination of the whole matter, it shall appear to the magistrate either that no offense has been committed by any person or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner.

Code, s. 1151; 1868-9, c. 178, subc. 3, s. 20.

3183. In lynching. Whenever the solicitor of any judicial district shall ascertain that the crime of lynching has been committed in any county in his judicial district, it shall be his duty to go to such county at the earliest possible moment, and at once institute proceedings for the investigation of the crime before the coroner of the county, some judge of the superior court, or justice of the peace, and for the apprehension of the offender. In the performance of this duty he shall cause to be issued subpoenas or other process to compel the attendance of witnesses and examine such witnesses on oath as to their knowledge or information touching the crime being investigated. In all cases where, upon preliminary investigation, it appears probable that any person is guilty of the crime charged, it shall be the duty of the coroner, judge or justice before whom the case is heard to bind such person, with good security, for his appearance at the next ensuing term of the superior or criminal court of some county adjoining the county in which the crime was committed for trial, and in default of bail to commit him to the jail of such adjoining county for safe-keeping, and all necessary witnesses shall be recognized to appear at such term as witnesses for the state.

1893, c. 461, s. 2.

3183a. Participants in lynching must testify. In all investigations before a justice of the peace, coroner, judge, grand jury, or courts and jury, on the trial of the cause, as authorized by the preceding section or under existing law, no person shall be excused from testifying touching his knowledge or information in regard to the offense being investigated, upon the ground that his answer might tend to subject him to prosecution, pains or penalties, or that his evidence might tend to criminate himself, but no discovery made by such witness upon any such examination shall be used against him

in any court or in any penal or criminal prosecution, and he shall, when so examined as a witness for the state, be altogether pardoned of any and all participation in any crime arising under the provisions of the preceding section, or under existing law, concerning which he is required to testify.

3184. Prisoner bound over, when. If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, if the offense be bailable, and the prisoner offer sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offense be not bailable, the prisoner shall be committed to prison.

Code, ss. 1152, 1156; 1868-9, c. 178, subc. 3, ss. 21, 25.

3185. Witnesses against prisoner recognized. The magistrate shall bind by recognizances the prosecutor and all the material witnesses against such prisoner to appear and testify at the next term of the court having jurisdiction for the county in which the offense is alleged to have been committed.

Code, s. 1152; 1868-9, c. 178, subc. 3, s. 21.

3186. Witnesses required to give security for appearance. Whenever such magistrate shall be satisfied by the proof that there is good reason to believe that any such witness will not fulfill the conditions of such recognizance unless security be required, he may order such witness to enter into a recognizance with such sureties as he shall deem meet for his appearance at such court.

Code, s. 1154; 1868-9, c. 178, subc. 3, s. 23.

3187. Examinations and recognizances certified to court. All examinations and recognizances taken pursuant to the provisions of this chapter shall be certified by the magistrate taking the same to the court at which the witnesses are bound to appear, on the first day of the sitting thereof; and the examinations taken and subscribed as herein prescribed may be used as evidence before the grand jury, and on the trial of the accused, provided he was present at the taking thereof and had an opportunity to hear the same and to cross-examine the deposing witness, if such witness be dead or so ill as not to be able to travel, or by procurement or connivance of the defendant hath removed from the state, or is of unsound mind.

Code, s. 1157; 1868-9, c. 178, subc. 3, s. 26.

3188. Penalty for failing to return. If any magistrate shall refuse or neglect to return to the proper court any such examination or recognizance by him taken, he may be compelled by rule of court forthwith to return the same, and in case of disobedience of such

rule, may be proceeded against by attachment as for contempt of court as provided by law.

Code, s. 1158; 1868-9, c. 178, subc. 3, s. 27.

NOTE. For right of prisoner to testify in his own behalf, see Evidence, ss. 1618, 1619.

VIII. BAIL.

3189. When bail allowed. If the offense charged in the warrant be not punishable with death, such magistrate may take from the person so arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offense shall be alleged to have been committed.

Code, s. 1139; 1868-9, c. 178, subc. 3, s. 8; 1871-2, c. 37, s. 1.

3190. Sheriff or deputy may take; not to become. When any sheriff or his deputy shall arrest the body of any person, in consequence of the writ of *capias* issued to him by the clerk of a court of record on an indictment found, the said sheriff or deputy, if the crime is bailable, shall recognize the offender, and take sufficient bail in the nature of a recognizance for his appearing at the next succeeding court of the county where he ought to answer, which recognizance shall be returned with the *capias*; and the sheriff shall in no case become bail himself.

Code, s. 1180; R. C., c. 35, s. 11; 1797, c. 474, s. 4.

3191. Who may take, before imprisonment. Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, shall be brought, shall have power to take bail as follows:

1. Any justice of the supreme court, or a judge of a superior court, or of a criminal court, in all cases.

2. Any justice of the peace or chief magistrate of any incorporated city or town, in all cases of misdemeanor, and in all cases of felony not capital.

Code, s. 1160; 1868-9, c. 178, subc. 3, s. 29; 1871-2, c. 37.

3192. Who may take, after imprisonment. Any justice of the supreme court or any judge of a superior court or of a criminal court shall have power to bail persons committed to prison charged with crime in all cases; any justice of the peace or chief magistrate of any incorporated city or town shall have the same power, in all cases where the punishment is not capital.

Code, s. 1161; 1868-9, c. 178, subc. 3, s. 30.

3193. Recognizance to be filed with clerk. Whenever any prisoner shall be bailed by any officer under the preceding section, such officer shall immediately cause the recognizance taken by him to be filed with the clerk of the superior court of the county to which the prisoner is recognized.

Code, s. 1162; 1868-9, c. 178, subc. 3, s. 31.

3194. Duty of magistrate granting bail. Any magistrate taking bail shall certify on the warrant the fact of his having let the defendant to bail, and shall deliver the same, together with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which such prisoner shall have been recognized to appear.

Code, s. 1140; 1868-9, c. 178, subc. 3, s. 9.

3195. Bail on continuance before justice. Upon the continuance of any criminal action returned before any justice of the peace for trial in which the said justice would be authorized to take bail on a finding of probable cause, or in which action he would have final jurisdiction, it shall be the duty of said justice of the peace, and he is hereby authorized and directed, to take such bond payable to the state of North Carolina, on the same being tendered by the accused, with such security as in his opinion will be sufficient to insure the appearance of the accused before him for trial at the time and place (which shall be mentioned in said bond) set for the trial.

1889, c. 133, s. 1.

IX. FORFEITED BAIL.

3196. Proceedings on recognizances to keep the peace. Every person who shall have entered into a recognizance to keep the peace shall appear according to the obligation thereof; and if he fail to appear, the court shall forfeit his recognizance and order it to be prosecuted, in the manner hereinbefore provided by law, unless reasonable excuse for his default be given.

Code, s. 1225; 1868-9, c. 178, subc. 2, s. 10.

3197. Recognizance, when deemed broken. No recognizance taken under this chapter shall be deemed to be broken except in the failure of the principal in such recognizance to appear and answer according to the obligation thereof, unless such principal be convicted of some offense amounting in judgment of law to a breach of such recognizance.

Code, s. 1227; 1868-9, c. 178, subc. 2, s. 12.

3198. When recognizance prosecuted. Whenever evidence of such conviction shall be produced in the court in which the recogni-

zance is filed, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the proper proceedings to be thereupon taken.

Code, s. 1228; 1868-9, c. 178, subc. 2, s. 13.

3199. Execution on judgment nisi not to issue before notice.

No execution shall issue upon a forfeited recognizance, or to collect a fine imposed nisi, until a notice has issued against the person who has forfeited his recognizance or upon whom the fine has been imposed, and his sureties.

Code, s. 1208; R. C., c. 35, s. 43; 1777, c. 115, s. 48.

3200. What notice to contain. When any recognizance, acknowledged by a principal and sureties, shall be forfeited by two or more of the recognizers, the notice issued thereon shall be jointly against them all, designating which of them are principals and which sureties, and when they are bound in different sums, stating the amount forfeited by each one, and the clerk shall have no greater fee on such notice than is due when it is issued against one defendant.

Code, s. 1209; R. C., c. 35, s. 44; 1812, c. 836, s. 1.

3201. How notices executed. All notices issuing upon forfeited recognizances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And in case he can not be found, and has no known place of abode, and the matter be returned, then a notice shall issue, and on the like return the same shall be deemed duly served.

Code, s. 1210; R. C., c. 35, s. 45; 1812, c. 836, s. 2.

3202. Judges may remit forfeited recognizances. The judges of the superior and criminal courts may hear and determine the petition of all persons, who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the state and the persons praying such relief, as well before as after final judgment entered and execution awarded.

Code, s. 1205; R. C., c. 35, s. 38; 1788, c. 292, s. 1.

3203. Clerk to refund, when. The clerk of the superior, criminal or inferior courts, on the remission of any forfeited recognizance which has been paid into his office, shall refund the same, or so much thereof as shall be remitted.

Code, s. 1206; R. C., c. 35, s. 39; 1795, c. 442, s. 1.

3204 Treasurer to refund, when. If the money has been paid to the county treasurer, he shall refund it to the person entitled, on

his producing an attested copy of the record from the clerk of the court, certifying that such recognizance hath been remitted or lessened, signed with his own proper name, with the seal of the court affixed thereto.

Code, s. 1207; R. C., c. 35, s. 40; 1795, c. 442, s. 2.

3205. Upon failure to appear before justice, judgment nisi; notice to sureties. On the failure of the accused to appear at the time and place mentioned in any bond taken by any justice of the peace for a continuance of any cause pending before him, and answer the charge, or, having appeared, shall depart the court without leave thereof first had and obtained, it shall be the duty of the said justice of the peace then presiding to enter judgment nisi against the principal and his sureties in said bond for the amount mentioned therein: Provided, the sum does not exceed the sum of two hundred dollars; and immediately issue notice to the principal and the sureties in said bond, giving ten days' time, specifying time and place, to appear and show cause, if any they have, why the said judgment nisi shall not be made final.

1889, c. 133, s. 2.

3206. Judgment final, when rendered. If the defendant shall fail to appear and show satisfactory reasons for not complying with the provisions of said bond, it shall then be the duty of the justice of the peace to render a final judgment thereon for the amount of the same, and immediately make and transmit to the clerk of the superior court a transcript thereof, which shall be entered upon the judgment docket of said court, and the clerk shall issue execution on said final judgment against the principal and his sureties for the collection of the amount thereof as in other judgments in behalf of the state.

1889, c. 133, s. 3.

3207. When bond exceeds two hundred dollars, procedure. If the bond aforesaid shall exceed the sum of two hundred dollars, and the accused shall fail to appear as therein provided to answer the charge, or, having appeared, shall depart the court without leave first had and obtained, it shall be the duty of the said justice to have the accused called, and enter upon the bond that the defendant was called and failed to answer, and immediately return the original papers in the case, together with the bond, to the clerk of the court having jurisdiction to try such action, who shall immediately enter the case upon the criminal docket of his court and enter judgment nisi for the amount of the said bond, and issue notice to the accused and his sureties to appear at the next term of said court to show cause why said judgment should not be made final and pro-

ceeded in as other cases of forfeited bonds in behalf of the state in said court. The entry on said bond by the justice of the peace shall be prima facie evidence that the principal therein had been called and failed to answer. Nothing in this section shall be so construed as to prevent justices of the peace from remitting the penalty of the bond or the right of appeal from the justice of the peace to the superior court by the defendant or his surety. .

1889, c. 133, s. 4.

3208. Bail may arrest and surrender principal; effect on liability. The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him, until he shall have an opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the defendant in custody, as if bail had never been given: Provided, that in criminal proceedings, the surrender by the bail, after the recognizance forfeited, shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for.

Code, s. 1230; R. C., c. 11, s. 5; 1777, c. 115, s. 20; 1848, c. 7.

3209. Person surrendered may give bail; sheriff liable for release. Any person surrendered in the manner specified in the preceding section, shall have liberty, at any time, before final judgment against him, to give bail; and in case of such surrender, the sheriff shall take the bail bond or recognizance to the succeeding court; and in case the sheriff shall release such person without bail, or the bail returned be held insufficient, on exception taken the same term to which such bail bond shall be returned, and allowed by the court, the sheriff, having due notice thereof in criminal cases, shall forfeit to the state the sum of one hundred dollars, to be recovered on motion in like manner as forfeitures for not returning process, and be subject to be indicted for misdemeanor in office; and it shall be the duty of the prosecuting officer to collect the forfeiture; and, in case of a release, the sheriff shall be liable for an escape, and may be prosecuted and punished as provided for in the chapter entitled Crimes.

Code, s. 1231; R. C., c. 11, s. 6; 1827, c. 40.

3210. Sheriff may take bail of prisoner in custody. If any person for want of bail shall be lawfully committed to jail at any time before final judgment, the sheriff, or other officer having him in

custody, may take sufficient justified bail and discharge him; and the bail bond shall be regarded, in every respect, as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken.

Code, s. 1232; R. C. c. 11, s. 8.

3211. May plead any defense principal might. Every matter which would entitle the principal to be discharged from arrest, may be pleaded by the bail in exoneration of his liability.

Code, s. 1233; R. C. c. 11, s. 9.

X. COMMITMENT.

3212. Must state what. Every commitment to prison of a person charged with crime shall state:

1. The name of the person charged.
2. The character of the offense with which he is charged.
3. The name and office of the magistrate committing him.
4. The manner in which he may be discharged; if upon giving recognizance or bail, the amount of said recognizance, the condition on the performance of which it shall be discharged, and the persons or magistrate before whom the bail may justify.
5. The court before which the prisoner shall be sent for trial.

Code, s. 1163; 1868-9, c. 178, subc. 3, s. 32.

3213. To what jail. All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offense is charged to have been committed: Provided, if the jails of these counties are unsafe, or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdiction, shall receive such prisoner and give a receipt for him, and be bound for his safe-keeping as prescribed by law.

Code, s. 1164; 1868-9, c. 178, subc. 2, s. 33.

3214. Of witnesses. If any witness so required to enter into a recognizance, either with or without sureties, shall refuse to comply with such order, it shall be the duty of such magistrate to commit him to prison until he shall comply with such order, or be otherwise discharged according to law.

Code, s. 1155; 1868-9, c. 178, subc. 3, s. 24.

XI. VENUE.

3215. Lynching. The superior court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county; and whenever the solicitor of the district has information of the commission of such a crime, it shall be his duty to furnish such information to the grand juries of all adjoining counties to the one in which the crime was committed from time to time until the offenders are brought to justice.

1893, c. 461, s. 4.

3216. When crime committed on waters dividing counties. When any offense shall be committed on any water, or water-course, whether at high or low water, which said water or water-course, or the sides or shores thereof, shall divide counties, such offense may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offense was committed.

Code, s. 1193; R. C., c. 35, s. 24.

3217. When assault in one county, death in another. In all cases of felonious homicide, when the assault shall have been made in one county within the state, and the person assaulted shall die in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made.

Code, s. 1196; R. C., c. 35, s. 27; 1831, c. 22, s. 1.

3218. Assault in this state, death in another. In all cases of felonious homicide, when the assault shall have been made within this state, and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes, as if the person assaulted had died within the limits of this state.

Code, s. 1197; R. C., c. 35, s. 28; 1831, c. 22, s. 2.

3219. Person in this state injuring one in another. If any person, being in this state, shall unlawfully and wilfully put in motion a force, from the effect of which any person shall be injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this state, as he would be if the effect had taken place within this state.

1895, c. 169.

3220. Death in this state, immaterial where injury inflicted. If a mortal wound is given or other violence or injury inflicted, or poi-

son is administered on the high seas or land, either within or without the limits of this state, by means whereof death ensues in any county thereof, said offense may be prosecuted and punished in the county where the death happens.

1891, c. 68.

3221. Improper, taken advantage of by plea in abatement; judgment in misdemeanors; trial in felonies. Because the boundaries of many counties are either undetermined, or unknown, by reason whereof high offenses go unpunished; therefore, for the more effectual prosecution of offenses committed on land near the boundaries of counties, in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement, the truth whereof shall be duly verified on oath or otherwise both as to substance and fact, wherein shall be set forth the proper county in which the supposed offense, if any, was committed; whereupon the court may, on motion of the state, commit the defendant, who may enter into recognizance, as in other cases, to answer the offense in the county averred by his plea to be the proper county; and, on his prosecution in that county, it shall be deemed, conclusively, to be the proper county. But if the state, upon the plea aforesaid, will join issue, and the matter be found for the defendant, he shall be required to enter into recognizance as in other cases to answer the offense in the county averred by his plea to be the proper county, provided the offense beailable; and, if notailable, he shall be committed for trial in the county; and, if it be found for the state, the court in all offenses or misdemeanors shall proceed to pronounce judgment against the defendant, as upon conviction; and, in all cases of felony, the defendant shall be at liberty to plead to the indictment, and be tried on his plea of not guilty.

Code, s. 1194; R. C., c. 35, s. 25.

NOTE. For venue in larceny and receiving, see Crimes, s. 3470.

For venue in beating way on trains, see Crimes, s. 3711.

For venue in indictments against railroads for discriminating against A. & N. C. Railroad, see Crimes, s. 3699.

XII. PRESENTMENT.

3222. No person arrested on presentment, nor tried except on indictment. No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law.

Code, s. 1175; R. C., c. 35, s. 6; 1797, c. 474, s. 3; 1879, c. 12.

Note. See Const., Art. I, ss. 11, 13, 17.

3223. Names of witnesses endorsed on presentment. When a presentment shall be made of any offense by a grand jury, upon the knowledge of any of their body, or upon the testimony of witnesses, the names of such grand jurors and witnesses shall be indorsed thereon.

Code, s. 1176; R. C., c. 35, s. 7; 1797, c. 474, s. 2.

XIII. INDICTMENT.

3224. Returned by foreman except in capital cases. Grand juries shall return all bills of indictment in open court through their acting foreman, except in capital felonies when it shall be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body.

1889, c. 29.

3225. Substance of proceedings only set forth in. In every indictment, information, or impeachment in which, by the common law, it may be necessary to set forth at length the judicial proceedings had in any case then or formerly pending in any court, civil or military, or before any justice of the peace, it shall be sufficient to set forth the substance only of said proceedings, or the substance of such part thereof as make, or help to make, the offense prosecuted.

Code, s. 1184; R. C., c. 35, s. 15.

3226. For homicide. In indictments for murder and manslaughter, it shall not be necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it shall be sufficient in describing murder to allege that the accused person feloniously, wilfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it shall be sufficient in describing manslaughter to allege that the accused feloniously and wilfully, did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be.

1887, c. 58.

3227. For perjury. In every indictment for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom, the

oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed.

Code, s. 1185; R. C., c. 35, s. 16; 1842, c. 49, s. 1.

3228. For perjury, form of. In indictments for perjury the following form shall be sufficient, to-wit:

The jurors for the state, on their oath, present, that A. B. of county, did unlawfully commit perjury upon the trial of an action in court, in county, wherein was plaintiff and was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the said statement, or statements, to be false, or being ignorant whether or not said statement was true.

1889, c. 83.

3229. For subornation of perjury. In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceedings, and without setting forth the commission or authority of the court or person before whom the perjury was committed or was agreed or promised to be committed.

Code, s. 1186; R. C., c. 35, s. 17; 1842, c. 49, s. 2.

3230. When greater punishment for second offense, how former conviction stated. In any indictment for an offense which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, it shall be sufficient to state that the offender was, at a certain time and place, convicted thereof, without otherwise describing the previous offense; and a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.

Code, s. 1187; R. C., c. 35, s. 18.

3231. Ownership of property in common; how stated in. In any indictment wherein it shall be necessary to state the ownership of any property whatsoever, whether real or personal, which shall belong to, or be in the possession of, more than one person, whether such persons be partners in trade, joint tenants or tenants in common,

it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any such indictment, it shall be necessary to mention, for any purpose whatsoever, any partners, joint tenants or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall extend to all joint stock companies and trustees.

Code, s. 1188; R. C., c. 35, s. 19.

3232. How money, bank notes, etc., described in. In every indictment in which it shall be necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it shall be sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven.

Code, s. 1190; 1876-7, c. 68.

3233. For embezzlement. In indictments for embezzlement, except when the offense shall relate to a chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved.

Code, s. 1020; 1871-2, c. 145, s. 2.

3234. Intent to defraud; larceny and receiving. In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it shall be sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer, in his official capacity, or any copartnership or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny.

Code, s. 1191; R. C., c. 35, ss. 21, 23; 1852, c. 87, s. 2; 1874-5, c. 62.

3235. Not quashed for informality. Every criminal proceeding by warrant, indictment, information, or impeachment, shall be sufficient in form for all intents and purposes, if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

Code, s. 1183; R. C., c. 35, s. 14; 37 Hen. VIII., c. 8; 1784, c. 210, s. 2; 1811, c. 809.

3236. Defects which do not vitiate. No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed, or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the statute," or vice versa; nor for omission of the words "against the form of the statute" or "against the form of the statutes," nor for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense.

Code, s. 1189; R. C., c. 35, s. 20; 7 Hen. VIII., c. 8.

NOTE. For procedure in indictments for libel, see ss. 1993, 3248.

XIV. TRIAL BEFORE JUSTICE.

3237. To hear and determine case, when. When the justice shall be satisfied that he has jurisdiction, if no jury shall be asked for, he shall proceed to determine the case, and shall either acquit the accused or find him guilty, and sentence him to such punishment as the case may require, not to exceed in any case a fine of fifty dollars, or imprisonment in the county jail for thirty days.

Code, s. 897; 1868-9, c. 178, subc. 4, s. 8.

3238. Trial by jury, if demanded. If either the complainant or the accused shall ask for it, the justice shall allow a trial by jury, as is provided in civil actions before justices of the peace.

Code, s. 898; 1868-9, c. 178, subc. 4, s. 9.

3239. What submitted to jury. In case a trial by jury shall be had, the justice shall submit to the jury in each case simply the question of the guilt or innocence of the accused of the offense charged, and shall enter the verdict on his docket, and adjudge accordingly.

Code, s. 899; 1868-9, c. 178, subc. 4, s. 10.

3240. Commitment after judgment. The commitment to the county prison shall set forth—

1. The name of the guilty person.
2. The nature of the offense of which he is convicted and the date of the trial.
3. The period of his imprisonment.
4. It shall be directed to the sheriff of the county, or to the keeper of the county jail, and shall direct him to keep the prisoner for the time stated, or until discharged by law.
5. The name of the constable or other officer required to execute it.
6. It shall be signed by the justice and be dated.

Code, s. 1238; 1868-9, c. 178, subc. 4, s. 17.

3241. Parties entitled to copy of papers; bar to indictment. He shall give to either party on request, and on payment of his lawful fee, a copy of the complaint and of his finding and sentence. Such finding and sentence may be pleaded in bar of any indictment subsequently found for the same offense.

Code, ss. 902, 903; 1868-9, c. 178, subc. 4, ss. 13, 14.

3242. Justice to make report of all criminal actions of which he has assumed final jurisdiction. It shall be the duty of each justice of the peace on or before Monday of every term of the superior court of his county, to furnish the clerk of said court with a list of the names and offenses of all parties tried and finally disposed of by such justice of the peace, together with the papers in each case, in all criminal actions, since the last term of the superior court. The clerk of the court shall hand a copy of such list to the solicitor and to the grand jury at each term of court; and no indictment shall be found against any party whose case has been so finally disposed of by any justice of the peace: Provided, that this section shall not be deemed to extend or enlarge or otherwise affect the jurisdiction of justices of the peace, except as provided by law.

Code, s. 906; 1869-70, c. 110.

XV. TRIAL, SUPERIOR COURT.

3243. Prisoner mute, plea "not guilty" entered. If any person, being arraigned upon or charged in any indictment for any crime, shall stand mute of malice or will not answer directly to the indictment, the court shall order the plea of "not guilty" to be entered on behalf of such person; and the plea so entered shall have the same force and effect as if such person had pleaded the same.

Code, s. 1198; R. C., c. 35, s. 29; R. S., c. 35, s. 16.

3244. Peremptory challenges by defendant; judge decides competency. Every person on joint or several trial for his life may make a peremptory challenge of twenty-three jurors and no more; and in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily and without showing cause, four jurors and no more. And to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel before the jury shall be impaneled to try the issue; and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors.

Code, s. 1199; 1887, c. 53; R. C., c. 35, s. 32; 1871-2, c. 39; R. S., c. 35, ss. 19, 21; 1777, c. 115, s. 85; 1812, c. 833; 1801, c. 592, s. 1; 1826, c. 9; 22 Hen. VIII., c. 14, s. 6.

3245. Peremptory challenges by state. In all capital cases, the prosecuting officer on behalf of the state shall have the right of challenging peremptorily four jurors for each defendant. Said challenge must be made before the juror is tendered to the prisoner; and if he will challenge more than four jurors he shall assign for his challenge a cause certain; and in all other cases of a criminal nature, a challenge of two jurors shall be allowed in behalf of the state, and challenges also for a cause certain, and in all cases of challenge for cause certain the same shall be inquired of according to the custom of the court.

Code, s. 1200; 1887, c. 53; R. C., c. 35, s. 33; 33 Edw. I., c. 4; 1827, c. 10.

3246. Jurors on special venire subject to challenge as tales jurors. In the trial of all criminal cases, where a special venire shall be ordered, the same causes of challenge to the jurors summoned on the special venire shall be allowed as exist to tales jurors.

1887, c. 53.

3247. Term expiring during trial, court continued; civil actions. In case the term of a court shall expire while a trial for felony shall be in progress, and before judgment shall be given therein, the judge

shall continue the term as long as in his opinion it shall be necessary for the purposes of the case; and he may in his discretion exercise the same power in the trial of any other cause under the same circumstances, except civil actions begun after Thursday of the last week.

Code, s. 1229; 1893, c. 226; C. C. P., s. 397; R. C., c. 31, s. 16; 1830, c. 22.

3248. Libel, defense to. Every defendant who shall be charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge.

Code, s. 1195; R. C., c. 35, s. 26.

3249. Defendant convicted of assault; when included in charge. On the trial of any person for rape, or any felony whatsoever, when the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character.

1885, c. 68.

3250. Conviction may be for a less degree or an attempt. Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.

1891, c. 205, s. 2.

3251. Burglary in first degree charged, verdict may be for second. When the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree if they deem it proper so to do.

1889, c. 434, s. 3.

3252. Verdict for murder in the second degree on bill for first. Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree.

1893, c. 85, s. 3.

3253. New trial to defendant. The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases.

Code, s. 1202; R. C., c. 35, s. 35; 1815, c. 895.

XVI. APPEAL.

3254. Defendant may appeal; trial de novo. The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings.

Code, s. 900; 1868-9, c. 178, subc. 4, s. 11; 1879, c. 92, s. 10.

3255. Papers sent to appellate court; return what to contain. In every case in which an appeal shall be prayed the justice shall forthwith transmit to the clerk of the superior court of the county all papers in the case, together with a copy of the verdict, if any, of his determination of the facts if there shall have been no trial by jury, and of the sentence, in which shall be set forth all the facts found by him, as well as his finding of those which were alleged in the complaint, and which were found by him not to be proved.

Code, s. 901; 1868-9, c. 178, subc. 4, s. 12.

3256. When state may appeal. An appeal to the supreme court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant—

1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment.

Code, s. 1237.

3257. When defendant may appeal. In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions.

Code, s. 1234; R. C., c. 4, s. 21; 1818, c. 962, s. 4.

3258. Defendant may appeal without security for costs. In all such cases of conviction in the said courts, the defendant shall have

the right to appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith.

Code, s. 1235; 1869-70, c. 196, s. 1.

3259. Appeal granted, bail allowed defendant. It shall be the duty of the judge on filing the affidavit required in the preceding section, to grant the appeal without security for costs; and for any bailable offense shall require the defendant to enter into recognizance in a reasonable sum to make his appearance at the first term of the superior court to be held in the county and to further answer the charge preferred.

Code, s. 1236; 1869-70, c. 196, s. 2.

3260. Bail pending appeal. When any person convicted of a misdemeanor, and sentenced by the court, shall appeal, the court shall allow such person to give bail pending appeal.

Code, s. 1181; R. C., c. 35, s. 12; 1850-1, c. 2.

3261. Appeal not to vacate judgment; stays execution. In criminal cases an appeal to the supreme court shall not have the effect of vacating the judgment appealed from, but upon perfecting the appeal as now required by law, either by giving bond or in forma pauperis, there shall be a stay of execution during the pendency of the appeal.

1887, c. 191, s. 1; 1887, c. 192, s. 4.

3262. Judgment for fines docketed; lien as other judgments; execution issued. When the sentence in whole or in part directs the payment of a fine, the judgment shall be docketed by the clerk and be a lien on the real estate of the defendant in the same manner as judgments in civil actions, and executions thereon shall only be stayed, upon an appeal taken, by security being given in like manner as is required in civil cases. Should the judgment be affirmed, the clerk of the superior court, on receipt of the certificate from the supreme court, shall issue execution on such judgment.

1887, c. 191, s. 3.

3263. Upon receipt of certificate of opinion of supreme court, what to be done. The clerk of the superior court, in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the supreme court notify the sheriff, who shall proceed to execute the sentence which was appealed from. In criminal cases where the judgment is not affirmed the cases shall be placed upon

the docket for trial at the first ensuing term of the court after the receipt of such certificate.

1887, c. 192, s. 3.

3263a. Rehearing; new trials for new evidence. Rehearings and new trials for newly discovered evidence, shall be granted by the supreme court in criminal actions upon the same grounds and subject to the same rules and regulations as obtain in civil actions.

XVII. EXECUTION.

3264. Governor to issue warrant for execution of death penalty. In all cases of affirmance of a sentence for a capital felony the clerk of the supreme court, at the same time that the decision of the supreme court is certified down to the superior court, shall send a duplicate thereof to the governor, who shall immediately issue his warrant under the great seal of the state to the sheriff of the county in which the appellant was sentenced, directing him to execute the death penalty on a day specified in said warrant, not less than thirty days from the date of said warrant; but this shall not deprive the governor of the power to pardon or relieve the defendant or to commute the sentence.

1887, c. 192, s. 3.

3265. Capital executions private. As the ends of justice, public morals and the preservation of order demand that the execution of all capital offenders should be made private and invested with the solemnity appropriate to the final act of penal law, any sheriff on whom shall devolve the execution of a sentence of death on a public offender shall be required to provide for the execution of such criminal within the jailyard inclosure, and as much removed from public view as the means within his control will allow.

Code, s. 1243; 1901, c. 215; 1868-9, c. 21, ss. 1, 2; 1879, c. 221.

3266. Witnesses and necessary assistants to be present at execution. The sheriff, after having provided for the private execution of the criminal, may admit by ticket, in addition to the required guard, two physicians and necessary assistants, not more than thirty-six nor less than eighteen respectable citizens, to witness for the state the due observance of the law.

Code, s. 1244; 1868-9, c. 21, s. 3.

NOTE. For incendiary fires, procedure for investigating, see Insurance.

For procedure in mayor's court, see Towns and Cities.

For outlawing by justices, see s. 3166.

When defendant imprisoned for nonpayment of fine and costs, see Costs, s. 1239.

CHAPTER 85.

CRIMES.

| | Sections. |
|-------------------------------------|-----------|
| I. General provisions, | 3267—3272 |
| II. Animals, | 3273—3304 |
| III. Banks, | 3305—3307 |
| IV. Building and loan associations, | 3308—3309 |
| V. Burglary, | 3310—3314 |
| VI. Burnings, | 3315—3325 |
| VII. Chastity, | 3326—3332 |
| VIII. Domestic relations, | 3333—3350 |
| IX. Drainage, | 3351—3358 |
| X. Elections, | 3359—3377 |
| XI. Embezzlement, | 3378—3385 |
| XII. Fences, | 3386—3388 |
| XIII. Fishing, | 3389—3393 |
| XIV. Forgery, | 3394—3402 |
| XV. Frauds, | 3403—3411 |
| XVI. Government, | 3412—3414 |
| XVII. Health, | 3415—3426 |
| XVIII. Hunting, | 3427—3445 |
| XIX. Insurance, | 3446—3459 |
| XX. Larceny, | 3460—3472 |
| XXI. Liquors, | 3473—3493 |
| XXII. National guard, | 3494—3500 |
| XXIII. Navigation, | 3501—3520 |
| XXIV. Officers, | 3521—3560 |
| XXV. Perjury, | 3561—3567 |
| XXVI. Person, | 3568—3590 |
| XXVII. Professions, | 3591—3600 |
| XXVIII. Prisoners and convicts, | 3601—3606 |
| XXIX. Property, | 3607—3633 |
| XXX. Public justice, | 3634—3646 |
| XXXI. Public peace, | 3647—3653 |
| XXXII. Public police, | 3654—3688 |
| XXXIII. Public property, | 3689—3694 |
| XXXIV. Railroads, | 3695—3716 |
| XXXV. Roads and bridges, | 3717—3733 |
| XXXVI. Revenue, | 3734—3740 |
| XXXVII. Safety, | 3741—3745 |
| XXXVIII. Sales, | 3746—3766 |
| XXXIX. Schools, | 3767—3774 |
| XL. Sunday, | 3775—3779 |
| XLI. Telegraph and telephone, | 3780—3784 |
| XLII. Trade-marks, | 3785—3791 |
| XLIII. Watersheds, | 3792—3797 |

I. GENERAL PROVISIONS.

3267. Accessories to felonies before the fact, when, where, and how tried and punished. If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person

so counseling, procuring, or commanding, shall be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offense of the person so counseling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offense had been committed at the same place as the principal felony or where the principal felony is triable, although such offense may have been committed at any place within or without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the offense of counseling, procuring or commanding shall have been committed within the body of any other county, the last-mentioned offense may be inquired of, tried, determined, and punished in either of such counties: Provided, that no person who shall be once duly tried for any such offense, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offense.

Code, s. 977; R. C., c. 34, s. 53; 1797, c. 485, s. 1; 1852, c. 58.

3268. Accessories to felonies after the fact, when, where, and how tried and punished. If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years; and may also be fined in the discretion of the court. And the offense of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the act by reason

whereof any person shall have become accessory shall have been committed within the body of any other county, the offense of such person guilty of a felony as aforesaid may be inquired of, tried, determined, and punished in either of said counties: Provided, that no person, who shall be once duly tried for such felony, shall be again indicted or tried for the same offense.

Code, s. 978; R. C., c. 34 s. 54; 1797, c. 485, s. 1; 1852, c. 58.

3269. Accessories before the fact, how punished. Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape, shall be imprisoned for life in the state's prison. An accessory before the fact to the stealing of any horse, mare, gelding or mule, on being duly convicted thereof, shall be imprisoned in the state's prison for not less than five nor more than twenty years, in the discretion of the court. Every accessory before the fact, in any other felony, shall be punished by imprisonment in the state's prison or county jail for not more than ten years, or may be fined, in the discretion of the court.

Code, s. 980; 1868-9, c. 31, s. 2; 1874-5, c. 212.

3270. Felonies and misdemeanors defined. A felony is a crime which is or may be punishable by either death or imprisonment in the state's prison. Any other crime is a misdemeanor.

1891, c. 205, s. 1.

3271. Felonies, punishment of. Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute, shall be imprisoned in the county jail or state's prison not exceeding two years, or be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or state's prison not less than four months nor more than ten years, or be fined.

Code, s. 1096; R. C., c. 34, s. 27.

3272. Misdemeanors, punishment of. All misdemeanors, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail, not less than four months nor more than ten years, or be fined.

Code, s. 1097; R. C., c. 34, s. 120.

II. ANIMALS.

3273. Contagious diseases, rules for prevention of. If any person shall wilfully violate any regulation made by the board of agriculture for the quarantine of infected animals or for the trans-

portation of stock into this state, or for transporting stock from one section of the state to another section, or for the establishment and maintenance, in co-operation with the department of agriculture of the United States, of cattle districts or quarantine lines to prevent the infection of cattle from splenic or Spanish fever, Texas fever or other infectious or contagious diseases, he shall be guilty of a misdemeanor.

1901, c. 479, s. 4, b3.

3274. Contagious disease, having, sold. If any person shall sell, or offer for sale, or shall use, or expose, or cause or procure to be sold or offered for sale, or to be used or exposed, any horse or other animal having the disease known as glanders or farcy, or any other contagious or infectious disease known by such person to be dangerous to life, or which shall be diseased past recovery, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 2488; 1891, c. 65; 1881, c. 368, s. 7.

3275. Contagious diseases, glanders or farcy; having glanders or farcy to be killed. If the owner of any animal having the glanders or farcy shall omit or refuse, upon discovery or knowledge of its condition, to deprive the same of life at once he shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 2489; 1891, c. 65; 1881, c. 368, s. 8.

3276. Contagious diseases, hogs not to run at large. If any person having swine affected with the disease known as hog cholera, or any other infectious or contagious disease, and discovering the same, or to whom notice of the fact shall be given, shall fail or neglect for five days to secure the diseased swine from the approach or contact with other hogs not so affected, by penning or otherwise securing and effectually isolating them, so that they shall not have access to any ditch, canal, branch, creek, river or other water-course which passes beyond the premises of the owners of such swine, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1889, c. 173, s. 1; 1891, c. 67, ss. 1, 3; 1903, c. 106; 1899, c. 47.

3277. Contagious diseases, hogs dying with, buried or burned. If any hog or other animal shall die with the hog cholera or other infectious disease, and the owner thereof shall fail to burn or to so bury the same as to secure it from the reach or contact with other hogs or other domestic animals of value, or if he shall throw or place such hog or other animal in any ditch, canal, branch, creek,

river or other water-courses passing beyond his own premises, he shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1889, c. 173, s. 2; 1891, c. 67, ss. 2, 3; 1903, c. 106; 1899, c. 47.

3278. Contagion, prevention of. If any person shall transport, drive or cause to be driven or allow to stray any live stock from any place in this state or from South Carolina into this state west of the following line at any period of the year between the fifteenth day of February and the fifteenth day of November in each and every year, he shall for each offense be guilty of a misdemeanor and punished by fine or imprisonment at the discretion of the court. Beginning at the southwest corner of the county of Cherokee; thence along the southern boundary of the counties of Cherokee, Clay, Macon, Jackson and Transylvania to the southeast corner of the county of Transylvania; thence northwesterly along the eastern boundary of Transylvania county to the southwest corner of the county of Buncombe to the summit of the Blue Ridge mountains; thence in a northeasterly direction following the top of said mountains to their intersection with the northern boundary line of the state of North Carolina.

1899, c. 542, s. 2; 1885, c. 410; 1887, c. 386.

3279. Cruelty to; construed how. If any person shall wilfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, or cruelly beat, or needlessly mutilate, or kill or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, or deprived of necessary sustenance, or to be cruelly beaten, needlessly mutilated, or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. In this section, and in every law which may be enacted, relating to animals, the words "animal" and "dumb animal" shall be held to include every living creature; the words "torture," "torment" or "cruelty" shall be held to include every act, omission or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted; but such terms shall not be construed to prohibit lawful shooting of birds, deer and other game for human food.

Code, ss. 2482, 2490; 1891, c. 65; 1881, c. 34, s. 1; 1881, c. 368, ss. 1, 15.

3280. Cruelty to, instigating or promoting. If any person shall wilfully set on foot, or instigate, or move to carry on, or promote, or engage in, or do any act towards the furtherance of any act of cruelty to any animal, he shall be guilty of a misdemeanor, and upon

conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 2487; 1891, c. 65; 1881, c. 368, s. 6.

3281. Cruelty to by bear-baiting and cock-fighting. If any person shall keep, or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting, or baiting any bull, bear, dog, cock, or other animal; or if any person shall encourage, aid or assist therein, or shall permit or suffer any place to be so kept or used, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars, or imprisoned not more than thirty days.

Code, s. 2483; 1891, c. 65; 1881, c. 368, s. 2.

3282. Conveying in cruel manner. If any person shall carry or cause to be carried in or upon any vehicle, or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days; and whenever he shall be taken into custody therefor by any officer, such officer may take charge of such vehicle or other conveyance and its contents, and deposit the same in some safe place of custody; and the necessary expenses which may be incurred for taking charge of and keeping and sustaining the same shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same of the owner of said animal in an action therefor.

Code, s. 2486; 1891, c. 65; 1881, c. 368, s. 5.

3283. Dogs, female, running at large. If any person owning or having any bitch shall knowingly permit her to run at large during the erotic stage or copulation he shall be guilty of a misdemeanor and fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Code, s. 2501; 1862-3, c. 41, s. 2.

3284. Dogs, sheep-killing, to be killed. If any person owning or having any dog that kills sheep, upon satisfactory evidence of the same being made before any justice of the peace of the county, and the owner duly notified thereof, shall refuse to kill it, and shall permit such dog to go at liberty, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days, and the dog may be killed by any one if found going at large.

Code, s. 2500; 1862-3, c. 41, s. 1; 1874-5, c. 108, s. 2.

3285. Dogs, failing to kill when mad. If the owner of any dog shall know, or have good reason to believe, that his dog, or any dog belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately to kill the same, he shall forfeit and pay the sum of fifty dollars to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by any one, in his property or person, by the bite of any such dog, and shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 2499; R. C., c. 67.

3286. False representation of pedigree. If any person shall, with intent to defraud or cheat, knowingly represent any animal for breeding purposes as being of greater degree of any particular strain of blood than such animal actually possesses, and by such representation obtains from any other person money or other thing of value, he shall be guilty of a misdemeanor, and upon conviction thereof shall for each offense be punished by a fine of not less than sixty dollars nor more than three hundred dollars or by imprisonment for a term not exceeding six months.

1891, c. 94, s. 2.

3287. Fraudulent registration. If any person shall, by any false representation or pretense, with intent to defraud or cheat, obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register of any such association, society or company, or a transfer of any such registration, upon conviction thereof he shall be punished by imprisonment for a term not exceeding three months or a fine not exceeding one hundred dollars, or by both such fine and imprisonment.

1891, c. 94, s. 1.

3288. Impounding unlawfully. If any person shall wilfully and unlawfully take, drive, or in any way move any other person's horse, mule, ass, neat cattle, sheep, hog, goat or dog, from the range, or elsewhere, into any stock law district, or into the limits of any city or town, having the right to impound or destroy the same, with intent to secure the poundage or other penalty, or with intent to injure the owner of such animal, or to require him to pay any poundage or penalty on account of such animal, or for hire or reward, he shall be guilty of a misdemeanor. If any person shall unlawfully and wilfully remove any animal above named from any

lawful enclosure, with intent to injure the owner, he shall be guilty of a misdemeanor.

1895, c. 141, s. 1.

3289. Impounded, releasing or receiving. If any person unlawfully receives or releases any impounded stock, or unlawfully attempts to do so, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 2819; 1889, c. 504.

3290. Impounded, to be fed and watered. If any person shall impound, or cause to be impounded in any pound or other place, any animal, and shall fail to supply to the same during such confinement a sufficient quantity of good and wholesome food and water, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 2484; 1891, c. 65; 1881, c. 368, s. 3.

3291. Impounder misappropriating money. If any impounder wilfully misappropriates money that he may receive from sale of stock impounded, or in any manner wilfully violates any provisions of the law in regard thereto, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 2818; 1889, c. 504.

3292. Injuries to, in inclosure without lawful fence. If any person shall wilfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any inclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court.

Code, s. 1003; 1868-9, c. 253.

3293. Injury of, in range. If any person shall unlawfully and on purpose drive any live stock, lawfully running at large in the range, from said range, or shall kill, maim, or injure any live stock, lawfully running at large in the range, or in the field or pasture of the owner, whether done with the actual intent to injure the owner, or to drive the stock from the range, or any other unlawful intent, every such person, his counselors, aiders, and abettors, shall be guilty of a misdemeanor. In the counties of Graham, Swain, Haywood, Jackson and Transylvania he shall be guilty of a felony and punished as if convicted of larceny: Provided, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places. In any indictment

ment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock maimed, killed or injured.

Code, s. 1002; 1885, c. 383; 1887, c. 368; 1895, c. 190; R. C., c. 34, s. 104; 1850, c. 94, ss. 1, 2.

3294. Killing cattle and failing to show hide and ears. If any person shall kill any neat cattle, sheep or hog in the woods or range, and shall for two days fail to show the hide and ears to the nearest justice or two freeholders, he shall be guilty of a misdemeanor.

Code, s. 2318; R. C., c. 17, s. 2; 1901, c. 546.

3295. Mismarking. If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, or ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a felony, and punished as if convicted of larceny.

Code, s. 1001; R. C., c. 34, s. 57; 1797, c. 485, s. 2.

3296. Stock law territory, not to run at large in. If any person shall allow his live stock to run at large within the limits of any county, township or district, in which a stock law prevails or shall prevail pursuant to law, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Code, s. 2811; 1889, c. 504.

3297. Stock law territory, fowls in. If the owner of any turkeys, geese, chickens, ducks or other domestic fowls shall allow the same to run upon the lands of another in any place where the stock law prevails, after having been notified to keep them up, he shall be guilty of a misdemeanor and fined not exceeding five dollars, or imprisoned not exceeding five days. If it shall be made to appear to any justice of the peace that such person persists in allowing his fowls to run at large, after two days' notice not to do so, the justice shall order such fowls to be killed by some lawful officer, or by the party injured.

1901, c. 645.

3298. Stock law territory, wilful driving on lands. If any person, in any stock law territory, shall wilfully, and not as the result of an accident, ride any horse or mule, or drive any horse or mule, either loose or to any vehicle or wagon, over the cultivated or enclosed lands of another, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars.

Code, s. 2829; 1885, c. 100; 1883, c. 391, ss. 1, 3.

3299. Stock law territory, riding or driving in. If any person, by riding or driving upon the lands of another in any stock law territory, without permission, or while driving live stock along any roadway, public or private, shall wilfully, deliberately or recklessly do or permit to be done any actual injury, to said land, or to the crops or other property growing or being thereon, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. But no such offender shall be proceeded against, unless the party injured or some one in his behalf shall cause a warrant to be issued, or an indictment to be found against the party offending, within fifteen days after the commission of the offense.

Code, s. 2828; 1889, c. 118.

3300. Stock law territory, owner in, turning outside. If any person having stock within the limits of a stock law territory, shall allow the same to run at large beyond the boundaries of said territory, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that a person owning land outside of the stock law territory may turn his or her stock upon the said land outside of the stock law district.

Code, s. 2827; 1889, c. 266; 1885, c. 371.

3301. Stone-horse running at large. If any person shall let any stone-horse or stone-mule of two years old or upwards run at large, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Code, s. 2325; R. C., c. 17, s. 6.

3302. Poisoning with shrubs. If any person shall throw into or leave exposed in any public square, street, lane, alley, or open lot in any city, town or village, or in any public road, any mockorange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby and shall also be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court.

1887, c. 338.

3303. Failure to comply with law as to strays. If any person shall fail to comply with any of the requirements of law as to strays, he shall be guilty of a misdemeanor and upon conviction he fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Note. For duties as to strays, see chapter Strays.

3304. Killing unmarked cattle in Haywood and Hyde counties. If any person not being the owner of any unmarked neat cattle, sheep

or hogs, shall kill any unmarked neat cattle, sheep or hogs in the range, such person shall, if the act be done with felonious intent, be guilty of larceny and punished as for that offense, and if not done with such intent shall be guilty of a misdemeanor: Provided, this section shall only apply to the counties of Haywood and Hyde.

1891, c. 258; 1895, c. 8.

III. BANKS.

3305. Examiner making false report. If any bank examiner shall knowingly and willingly make any false or fraudulent report of the condition of any bank which shall have been examined by him, with the intent to aid or abet the officers, owners or agents of such bank, in continuing to operate an insolvent bank; or if any such examiner shall receive or accept any bribe or gratuity, given for the purpose of inducing him not to file any report of an examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state's prison for not less than four months nor more than ten years.

1903, c. 275, s. 24.

3306. Officers and agents, malfeasance of. If any president, director, cashier, teller, clerk or agent of any bank shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the bank, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the bank with the intent in either case to injure or defraud or to deceive any officer of the bank, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony, and upon conviction shall be imprisoned in the state's prison for not less than four months, nor more than fifteen years, and likewise fined, at the discretion of the court.

1903, c. 275, s. 15.

3307. Statements, making false. If any person shall wilfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any bank, corporation, partnership, firm or individual transacting a banking business, or shall knowingly subscribe to or exhibit false papers, with the intent to deceive any person authorized to examine into the affairs of said bank, corporation, partnership, firm or individual, or shall wilfully and knowingly make, state or publish any false statement of the

amount of the assets or liabilities of any such corporation, partnership, firm or individual, he shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the state's prison not less than four months nor more than ten years.

1903, c. 275, s. 27.

IV. BUILDING AND LOAN ASSOCIATIONS.

3308. Agent acting without license. If any person shall solicit business or act as agent for any building or loan association or company in this state without having procured from the corporation commission a certificate that such association or company for which he offers to act is duly licensed by the state to do business for the current year in which such person solicits business or offers to act as agent, he shall be guilty of a misdemeanor.

1895, c. 444, s. 3.

3309. Failure to exhibit books; false statement. If any person having in his possession or control any books, accounts or papers of any building and loan association licensed by law, shall refuse to exhibit the same to the corporation commission, or its agents on demand, or shall knowingly or wilfully make any false statement in regard to the same, he shall be guilty of a misdemeanor, and fined and imprisoned at the discretion of the court.

1893, c. 434.

V. BURGLARY.

3310. Burglary, how punished. Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death, and any one so convicted of burglary in the second degree shall suffer imprisonment in the state's prison for life, or for a term of years, in the discretion of the court.

Code, s. 994; 1889, c. 434, s. 2; 1870-1, c. 222.

3311. Burglary in first and second degrees. There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling-house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of said crime, it shall be burglary in the first degree. If the said crime be committed in a dwelling-house or sleeping apartment not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling-house or in any building not a dwelling-house, but in which is a room used as a sleeping apartment and not actually occupied as such at

the time of the commission of said crime, it shall be burglary in the second degree.

1889, c. 434, s. 1.

3312. Burglary, breaking out of dwelling-house. If any person shall enter the dwelling-house of another with intent to commit any felony or other infamous crime therein, or being in such dwelling-house, shall commit any felony or other infamous crime therein, and shall, in either case, break out of the said dwelling-house in the night time, such person shall be guilty of burglary.

Code, s. 995; R. C., c. 34, s. 8; 12 Anne, c. 7, s. 3; 7 and 8 Geo. IV., c. 29, s. 11; 24 and 25 Vic., c. 96, s. 51.

3313. Breaking into houses otherwise than burglariously. If any person shall break or enter a dwelling-house of another otherwise than by a burglarious breaking; or shall break and enter a store-house, shop, warehouse, banking-house, counting-house, or other building, where any merchandise, chattel, money, valuable security, or other personal property shall be; or shall break and enter any uninhabited house, with intent to commit a felony or other infamous crime therein; every such person shall be guilty of a felony, and imprisoned in the state's prison or county jail not less than four months, nor more than ten years.

Code, s. 996; 1874-5, c. 166; 1879, c. 323.

3314. Burglary, intent to commit. If any person shall be found by night, armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found by night, having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of house-breaking; or shall be found by night in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of a felony and punished by fine or imprisonment in the state's prison, or both, in the discretion of the court.

Code, s. 997; 24 and 25 Vic., c. 96, s. 58.

VI. BURNINGS.

3315. Arson. Any person convicted according to due course of law of the crime of arson shall suffer death.

Code, 985; R. C., c. 34, s. 2; 1870-1, c. 222.

3316. Attempts. If any person shall wilfully attempt to burn any dwelling-house, uninhabited house, barn, stable, or outhouse, or mill, manufacturing house, cotton gin, tobacco barn, granary or turpentine distillery, the property of another, he shall be guilty of

a felony, and punished by imprisonment in the state's prison or county jail, and may also be fined, in the discretion of the court.

Code, s. 985, subsec. 7; 1876-7, c. 13.

3317. Bridges and buildings. If any person, with intent to destroy the same, shall wilfully and maliciously set fire to and burn any public bridge, or private toll bridge, or the bridge of any incorporated company, or any fire-engine house, or any house belonging to any county or incorporated town, used for public purposes other than the keeping of archives, documents and public papers, or any house belonging to an incorporated company and used in the business of such company; or if any person shall wilfully and maliciously attempt to burn any of the said houses or bridges, or any of the houses or buildings mentioned in this chapter, the person so offending shall be guilty of a felony and punished by imprisonment in the state's prison or county jail, for not less than four months nor more than ten years.

Code, s. 985, subsec. 4; R. C., c. 34, s. 30; 1825, c. 1278.

3318. Churches and other buildings. If any person shall wantonly and wilfully set fire to any church, chapel or meeting-house, or to any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of felony, and imprisoned in the state's prison for not less than two nor more than forty years.

1885, c. 66; 1903, c. 665, s. 2; 1874-5, c. 228; 7 and 8 Geo. IV., c. 30, s. 2; Code, s. 985, subsec. 6.

3319. Crops in field. If any person shall wilfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, or grass or sedge standing on the land, he shall be guilty of a felony, and punished by imprisonment in the county jail or state's prison for not less than four months nor more than five years.

1885, c. 42; 1874-5, c. 133; Code, s. 985, subsec. 2.

3320. Dwelling-houses for fraudulent purposes. If any person being the occupant of any building used as a dwelling-house, whether such person be the owner thereof or not, or, being the owner of any unoccupied building designed or intended as a dwelling-house, shall wilfully and wantonly or for a fraudulent purpose set fire to such building, he shall be guilty of a felony, and shall be punished by

imprisonment in the state's prison or county jail, and may also be fined in the discretion of the court.

Code, s. 985; 1903, c. 665, s. 3.

3321. Gin-house, tobacco house or stable. Every person convicted of any wilful burning of any gin-house or tobacco house, or any part thereof, or, in the night time, of any stable containing a horse or a mule, or cattle, shall be imprisoned in the state's prison not less than two nor more than ten years.

1863, c. 17; 1868-9, c. 167, s. 5; 1903, c. 665, s. 1; Code, s. 985, subsec. 2.

3321a. Incendiary fires, duty of city officers. If any town or city officer shall fail, neglect or refuse to comply with any of the requirements of the law in regard to investigation of incendiary fires, he shall be guilty of a misdemeanor and may be fined not less than twenty-five nor more than two hundred dollars.

1899, c. 58, s. 5.

3321b. Incendiary fires, duty of owner of premises. If the owner or occupant of any building or premises shall fail to comply with the orders of the chief of the fire department, or of the insurance commissioner, he shall be guilty of a misdemeanor, and fined not less than ten nor more than fifty dollars for each day's neglect.

1899, c. 58, s. 4.

3322. Public buildings. If any person shall wilfully and maliciously burn the state-house, or any of the public offices of the state, or any courthouse, jail, arsenal, clerk's office, register's office, or any house belonging to any county or incorporated town in the state, or to any incorporated company whatever, in which are kept the archives, documents, or public papers of such county, town, or corporation, he shall, on conviction, be imprisoned in the state's prison for not less than five, nor more than ten years.

Code, s. 985, subsec. 3; R. C., c. 34, s. 7; 1830, c. 41, s. 1; 1868-9, c. 167, s. 5.

3323. School-house. If any person shall wilfully set fire to any school-house, or procure the same to be done, he shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the state's prison or the county jail, and may also be fined in the discretion of the court.

1901, c. 4, s. 28.

3324. Woods. If any person shall set fire to any woods, except it be his own property, or, in that case, without first giving notice in writing to all persons owning lands adjoining to the woodlands intended to be fired, at least two days before the time of firing such woods, and also taking effectual care to extinguish such fire

before it shall reach any vacant or patented lands near to or adjoining the lands so fired, he shall, for every such offense, forfeit and pay to any person who will sue for the same fifty dollars, and be liable to any one injured in an action, and shall moreover be guilty of a misdemeanor.

Code, ss. 52, 53; R. C., c. 16, ss. 1, 2; 1777, c. 123, ss. 1, 2.

3325. Woods, from camp fires. If any wagoner or other person encamping in the open air shall leave his camp without totally extinguishing the camp fires, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, in the discretion of the court. This section shall only apply to the counties of Onslow, Pender, Edgecombe, Robeson, Wayne, Columbus, Cumberland, New Hanover, Bertie, Cabarrus, Harnett, McDowell, Davie, Bladen, Moore, Hertford and Chowan.

Code, s. 54; 1885, c. 126.

VII. CHASTITY.

3326. Carnal knowledge of virtuous girls between ten and fourteen years of age. If any person shall unlawfully carnally know or abuse any female child over ten and under fourteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and fined or imprisoned in the state's prison, in the discretion of the court.

1895, c. 295.

3327. Crime against nature. If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the state's prison not less than five nor more than sixty years.

Code, s. 1010; R. C., c. 34, s. 6; 1868-9, c. 167, s. 6; 5 Eliz., c. 17; 25 Hen. VIII., c. 6.

3328. Fornication and adultery. If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other.

Code, s. 1041; R. C., c. 34, s. 45; 1805, c. 684.

3329. Incest between certain near relatives. In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister, of the half or whole blood, the parties shall be guilty of a felony, and punished for every such offense by

imprisonment in the state's prison for a term not exceeding five years, in the discretion of the court.

Code, s. 1060; 1879, c. 16, s. 1.

3330. Incest between uncle and niece, etc. In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and punished by fine or imprisonment, in the discretion of the court.

Code, s. 1061; 1879, c. 16, s. 2.

3331. Lewd women within three miles of college. If any loose woman or woman of ill-fame shall commit any act of lewdness with or in the presence of any student, who is under twenty-one years old, of any boarding-school or college, within three miles of such school or college, she shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Upon the trial of any such case students may be competent but not compellable to give evidence. But no prosecution shall be had in such cases after the lapse of six months.

1889, c. 523.

3332. Seduction. If any man shall seduce an innocent and virtuous woman under promise of marriage he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the state's prison not exceeding the term of five years: Provided, the unsupported testimony of the woman shall not be sufficient to convict: Provided further, that marriage between the parties shall be a bar to further prosecution hereunder.

1885, c. 248.

NOTE. See Crimes, subchapter Person.

VIII. DOMESTIC RELATIONS.

3333. Abandonment of family by husband. If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor.

Code, s. 970; 1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92.

3334. Abandonment, evidence of. If the fact of abandonment and failure to provide adequate support of wife and children shall be proved, or, while being with such wife, neglect by the husband to provide for the adequate support of such wife or children, shall be

proved, then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, but is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is wilful.

Code, s. 971; 1868-9, c. 209, s. 3.

3335. Abandonment, failing to support family. If any husband, while living with his wife shall wilfully neglect to provide adequate support for such wife or the children which he has begotten upon her, he shall be guilty of a misdemeanor.

Code, s. 972; 1868-9, c. 209, s. 2; 1873-4, c. 176, s. 11; 1879, c. 92.

3336. Abduction of children. If any one shall abduct, or by any means induce any child under the age of fourteen years, who shall reside with the father, mother, uncle, aunt, brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be guilty of a felony, and on conviction shall be fined or imprisoned in the state's prison for a period not exceeding fifteen years.

Code, s. 973; 1879, c. 81.

3337. Abduction, conspiracy for. If any one shall conspire to abduct, or by any means shall induce any child under the age of fourteen years, who shall reside with any of the persons designated in the preceding section, or at school, to leave the persons aforesaid or the school, he shall be guilty of a like offense, and on conviction shall be punished as prescribed in the preceding section: Provided, that no one who may be a nearer blood relation to the child than the persons named in said section shall be indicted for either of said offenses.

Code, s. 974; 1879, c. 81, s. 2.

3338. Abduction of married women. If any male person shall abduct or elope with the wife of another he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided, that no conviction shall be had upon the unsupported testimony of any such married woman.

1903, c. 362.

3339. Bigamy. If any person, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North

Carolina, or elsewhere, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of felony, and imprisoned in the state's prison or county jail, for any term not less than four months nor more than ten years; and any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county: Provided, that nothing herein shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time, nor shall extend to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage, nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

Code, s. 988; 9 Geo. IV., c. 31, s. 22; R. C., c. 34, s. 15; 1790, c. 323; 1809, c. 783; 1829, c. 9.

3340. Marriage with female under fourteen. If any person shall marry a female under the age of fourteen years, he shall be guilty of a misdemeanor.

Code, s. 1083; R. C., c. 34, s. 46; 1820, c. 1041, ss. 1, 2,

3341. Miscegenation. All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. And any person violating this section shall be guilty of an infamous crime, and punished by imprisonment in the county jail or state's prison not less than four months nor more than ten years, and may also be fined in the discretion of the court.

Code, s. 1084; Const., Art. XIV, s. 8; R. C., c. 68, s. 7; 1834, c. 24; 1838-9, c. 24.

3342. Miscegenation; register of deeds; minister; justice. If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel, or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor.

Code, s. 1085; R. C., c. 34, s. 80; 1830, c. 4, s. 2.

3343. Marriage license; obtaining by false representation. If any person shall obtain a marriage license for the marriage of persons under the age of eighteen years by misrepresentation or false pretenses, he shall be guilty of a misdemeanor, and upon conviction shall for each offense be fined not exceeding fifty dollars, or

imprisoned not exceeding thirty days, or both, at the discretion of the court.

1885, c. 346.

3344. Marriage ceremony; performing without license. If any minister or officer shall marry any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or shall fail to return such license to the register of deeds within two months after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, he shall be guilty of a misdemeanor.

Code, s. 1817; 1871-2, c. 193, s. 8; R. C., c. 68, s. 5.

3345. Procuring possession of child unlawfully. If any parent who has forfeited his rights to the care and custody of any child by abandonment, as provided by section one hundred and seventy-eight, shall procure the possession and custody of such child, with respect to whom his or her rights and privileges are forfeited, otherwise than as by law provided, he shall be guilty of the crime of abduction and shall be punished as for abduction.

1885, c. 120, s. 4.

3346. Hiring another's servant. If any person shall knowingly hire, employ, harbor or detain in his own service any servant, employee, or wage hand of any other person, who shall have contracted in writing, or orally, for a fixed period of time to serve his employer, and who shall have left the service of his employer, in violation of his contract, he shall be guilty of a misdemeanor, and shall be civilly liable in damages to the party so aggrieved. This section shall apply to the following counties: Beaufort, Edgecombe, Person, Pitt, Washington, Warren, Vance, Pender, Halifax, Guilford, Granville, Hertford, Wayne and Caswell.

1901, c. 682; 1903, c. 365.

3347. Enticing servant to leave master. If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or orally to serve his employer, to unlawfully leave the service of his master or employer; or if any person shall knowingly and unlawfully harbor and detain, in his own service and from the service of his master, or employer, any servant who shall unlawfully leave the service of such master, or employer, then, in either case, such person and servant shall be guilty of a misdemeanor and fined not exceeding one hundred dollars or imprisoned not exceeding six months.

Code, ss. 3119, 3120; 1866, c. 58; 1866-7, c. 124; 1881, c. 303.

3348. Children under twelve not worked in factories. If any mill owner, superintendent or other person acting in behalf of a factory or manufacturing establishment shall knowingly and wilfully employ any child under twelve years of age to work in any factory or manufacturing establishment, except in oyster canning and packing manufactories where said canning and packing manufactories pay for opening or shucking oysters by the gallon or bushel, he shall be guilty of a misdemeanor.

1903, c. 473.

3349. Children under eighteen, hours of labor regulated. If any mill owner, superintendent, or other person acting in behalf of a factory or manufacturing establishment shall knowingly and wilfully require any person under eighteen years of age, except engineers, firemen, machinists, superintendents, overseers, section and yard hands, office men, watchmen or repairers of break-downs, to work in such factories or establishments a longer period than sixty-six hours in one week, he shall be guilty of a misdemeanor.

1903, c. 473, s. 2.

3350. Children, parents misstating age of. If any parent, or person standing in relation of parent, upon hiring his children to any factory or manufacturing establishment, shall fail to furnish such establishment a written statement of the age of such child or children being so hired, and if any such parent, or person standing in the relation of parent to such child or children shall, in such written statement misstate the age of such child or children being so employed, he shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court.

1903, c. 473, s. 3.

IX. DRAINAGE.

3351. Canal dug under parol agreement, unlawful to obstruct same. Where two or more persons have dug a canal or ditch along any natural drain or waterway under parol agreement, or otherwise, wherein all the parties have contributed to the digging thereof, if any servient owner shall fill up or obstruct said canal or ditch without the consent of the higher owners and without providing other drainage for the higher lands, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not more than thirty days.

1899, c. 255.

3352. Drain cut by consent, obstructing. If any person shall stop or in any way obstruct the passage of the water in any ditch or canal having been cut through lands of any person by consent of

owner of said land, until after giving the interested parties reasonable time to comply with the mode of proceedings provided for the drainage of lowlands, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1891, c. 434.

3353. Draining creeks, refusal to comply with order of board.

If any person shall refuse to comply with any requirements of a board duly appointed by the board of county commissioners to provide for the drainage of any creek, swamp, or branch, he shall be guilty of a misdemeanor and fined not exceeding two hundred dollars, or imprisoned not exceeding two years.

1887, c. 267, s. 7.

3354. Draining lowlands, refusal to act as commissioner.

If any person having been duly summoned by the county surveyor to act as a commissioner for the drainage of any creek, swamp, branch, or lowlands, shall refuse to serve, he shall be guilty of a misdemeanor and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

1887, c. 267, s. 6.

3355. Drains, obstructing, when necessary for mining.

If any person shall obstruct any drain or ditch constructed under the provisions of the law in regard to mines, he shall be guilty of a misdemeanor.

Code, s. 3301; 1871-2, c. 158, s. 12.

3356. Drainways, protection of, in certain counties.

If any person shall fell any tree in any ditch, canal or natural drainway of any farm in Beaufort, Pitt, Tyrrell or Craven county, unless he shall remove the same and put such ditch, canal or natural drainway in as good condition as it was before such tree was so felled, or if any person shall stop up or fill in such ditch, canal or drainway and thereby obstruct the free passage of water along the said ditch, canal or drainway, unless the said person shall first secure the written consent of the land owner, and those damaged by such obstruction in said ditch, canal and drainway, or unless such person, so filling in and stopping up such ditch, canal or drainway shall, upon the demand of the person so damaged, clean out and put the said ditch, canal or drainway in as good condition as the same was before such filling in and stopping up of the said ditch, canal or drainway happened, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than fifty dollars, or imprisoned not less than ten nor more than thirty days.

1901, c. 478.

3357. Sawdust in streams. If any person shall throw sawdust into any stream, he shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days. This section shall apply to the following streams only: All streams in Pamlico county; Drowning creek and its tributaries in Montgomery, Moore, Richmond, Cumberland and Robeson counties; Banners Elk in Watauga county; Little river and its tributaries in Montgomery county; all streams containing mountain or brook trout in Graham, Watauga, Cherokee, Clay, Macon, and Haywood counties; all streams in Henderson, Transylvania and Madison counties, except in Number 11 township, Madison county; Rock creek in Burke county; all streams in Yancey county; McLellan's creek in Upper Little River township in Harnett county; North and South Muddy creeks in McDowell county; Black river and its tributaries in Black River township in Harnett county; all streams in Graham county except Tennessee river; and all creeks and rivers in Cherokee county.

1889, c. 52; 1895 (Pr.), c. 327; 1897, cc. 130, 285; 1899, cc. 285, 453, 656; 1901, c. 158; 1903, cc. 243, 245, 627, 711, 721, 741, 760.

3358. Streams; failure of owner of dam to keep gates, etc. If any owner or keeper of a mill, whose dam is across any stream, shall fail to build a gate and slope therein, or thereafter to keep and maintain the same as required by commissioners to lay off rivers and creeks, he shall be guilty of a misdemeanor.

Code, s. 3715; 1858-9, c. 26, s. 4.

X. ELECTIONS.

3359. Betting on. If any person shall bet or wager any money or other thing of value upon any election held in this state he shall be guilty of a misdemeanor.

1901, c. 89, s. 56.

3360. Breaking up; disturbing officers. If any person by force and violence shall break up or stay any election, by assaulting the officers thereof, or depriving them of the ballot-boxes, or by any other means, he and his aiders and abettors shall be guilty of a misdemeanor and imprisoned not more than three months, and shall pay such fine as the court shall adjudge, not exceeding one hundred dollars. If any person shall interrupt or disturb the registrar while actually engaged in the registration of voters, or the registrar or judges of election while engaged in holding the election, or in counting and adding up the result thereof; or the board of county canvassers, or the state board of canvassers, while engaged in the discharge of their official duties, or behave in a disorderly or boisterous manner in the presence of said officers while so engaged in the dis-

charge of their official duties, or obstruct such officers in the legal discharge of the duties of their several positions, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1901, c. 89, s. 51.

3361. Bribery of voters. If any person shall at any time before or after an election, give or promise to give any money, property, or reward to any elector in order to secure his vote, he shall be guilty of a misdemeanor, and any person who shall receive or agree to receive any such bribe shall also be guilty of a misdemeanor.

1901, c. 89, s. 54.

3362. Discharging employee on account of vote. If any person shall discharge from employment, withdraw patronage from, or otherwise injure, threaten, oppress or attempt to intimidate any qualified voter of this state because of the vote such voter may or may not have cast in any election, he shall be guilty of a misdemeanor.

1901, c. 89, s. 53.

3363. Felon voting. If any person be challenged as being convicted of any crime which excludes him from the right of suffrage, he shall be required to answer any question in relation to such alleged conviction; but his answer to such questions shall not be used against him in any criminal prosecution, but if any person so convicted shall vote at the election, without having been restored to the right of citizenship, he shall be guilty of a felony and punished by a fine not exceeding one thousand dollars, or imprisoned in the state's prison not exceeding two years, or both.

1901, c. 89, s. 71.

3364. Liquor, giving away at. If any person shall give away any intoxicating liquor, except for medical purposes, and upon the prescription of a practicing physician, at any place within five miles of the polling place, at any time within twelve hours next preceding or succeeding any public election, whether general, local or municipal, or during the holding thereof, he shall be guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars.

1901, c. 89, s. 76.

3365. Oath, corruptly taking. If any person shall corruptly take the oath prescribed for voters, he shall be guilty of perjury, and be fined not less than five hundred dollars nor more than one thousand dollars, and be imprisoned in the state's prison not less than two nor more than five years.

1901, c. 89, s. 50.

3366. Officer failing to discharge duty. If any chairman of the county board of elections, or other returning officer whatever, shall wilfully, or of malice, neglect to perform any duty, act, matter or thing required or directed in the time, manner and form in which such duty, act, manner or thing is required to be performed in relation to the election, and returns thereof, of the governor, representatives in Congress, of justices of the supreme court, of judges of the superior court, of solicitors, or of electors for president and vice-president of the United States, or other officers, the person so offending shall be guilty of a felony, and fined not less than one thousand nor more than five thousand dollars, and be imprisoned not less than one nor more than three years.

1901, c. 89, s. 47.

3367. Permanent registration; taking false oath. If any person shall knowingly register under the permanent registration law who is not qualified within the meaning of said law, and article six, section four, of the constitution, or if any person shall knowingly take any false oath in registering under the same, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one thousand dollars or imprisoned not more than five years.

1901, c. 550, s. 12.

3368. Permanent registration, officer failing to discharge duty. If any officer charged with any duty under the permanent registration law wilfully fails and neglects to perform the same, he shall be guilty of a misdemeanor, and upon conviction shall forfeit his office and be fined not more than one thousand dollars or imprisoned not more than five years.

1901, c. 550, s. 11.

3369. Registering or voting at more than one box. If any person shall, with intent to commit a fraud, register or vote at more than one box or more than one time, or shall induce another to do so, or if any person shall illegally vote at any election, he shall be guilty of a felony and be imprisoned in the state's prison not less than six nor more than twelve months, or fined not less than one hundred nor more than five hundred dollars, at the discretion of the court, and if any registrar of voters, or any clerk or copyist, shall make any entry or copy with intent to commit a fraud, he shall be guilty of a like offense.

1901, c. 89, s. 48.

3370. Registering unlawfully. If any person shall cause or procure his name to be registered in more than one election ward or precinct, or shall cause or procure his name, or that of any other

person, to be registered, who is not entitled to vote in the ward or election precinct wherein such registration is made, or shall falsely personate any registered voter, he shall be guilty of a felony, and shall be punished for every such offense by a fine not exceeding one thousand dollars, or imprisoned in the state's prison not exceeding two years, or both, in the discretion of the court.

1901, c. 89, s. 70.

3371. Returns, failure to make. If any registrar or judge of election, or any county canvasser or commissioner, register of deeds, clerk or chairman of county board of elections shall fail to make the returns and perform the duties required of him, he shall be fined not less than five hundred dollars, or imprisoned not more than six months nor less than two months, at the discretion of the court.

1901, c. 89, s. 46.

3372. Returns, making false. If any person shall make, or certify, or deliver, or transmit a false return of an election held in this state, or make any erasure or alteration in the poll books, he shall be guilty of a felony and imprisoned in the state's prison not less than one year, and shall, in addition, forfeit and pay five hundred dollars, one-half to the use of the person who shall sue for the same, and the other half to the use of the state.

1901, c. 89, s. 83.

3373. Returns, copy of; refusal. If any register of deeds or clerk of the superior court shall refuse to make and give to any person a duly certified copy of the returns of any election, or of a tabulated statement of any election, the returns of which are by law deposited in his office, upon the tender of the fees therefor, he shall be guilty of a misdemeanor, and upon conviction dismissed from office and imprisoned for one year.

1901, c. 89, s. 83.

3374. Removal, officer acting after. If any member of the county board of elections, or any registrar or judge of election, after having been removed as provided by law, and notified thereof, shall continue to exercise the duties of the position from which he has been removed, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court.

1901, c. 89, s. 10.

3375. Taxes, sheriff to furnish list of. If any sheriff or tax-collector shall fail, between the first day of May and the tenth day of May of any year in which a general election occurs, to certify to the clerk of the superior court of his county a list of all persons who

have paid their poll tax for the previous year, he shall be guilty of a misdemeanor.

1901, c. 89, s. 13.

3376. Taxation, false certificate of exemption from. If any person shall wilfully and knowingly present to any election officer any false certificate of exemption from taxation he shall be guilty of forgery.

1901, c. 89, s. 13.

3377. Tax receipt given without payment. If any tax collector or sheriff shall wilfully fail to give a tax receipt to any person paying his poll tax, or shall falsely date any tax receipt or duplicate thereof, he shall be guilty of a misdemeanor, and punished in the discretion of the court.

1901, c. 89, s. 13.

XI. EMBEZZLEMENT.

3378. By railroad officers. If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company shall embezzle any moneys, bonds, or other valuable funds or securities, with which such president, secretary, treasurer, director, engineer, agent, or other officer shall be charged by virtue of his office or agency, or shall in any way, directly or indirectly, apply or appropriate the same, for the use or benefit of himself, or any other person, state, or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent, or other officer, for every such offense the person so offending shall be guilty of felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be imprisoned in the state's prison not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars.

Code, s. 1018; 1870-1, c. 103, s. 1.

3379. Conspiracy for. If any person shall agree, combine, colude, or conspire with the president, secretary, treasurer, director, engineer or agent of any railroad company, to commit any offense specified in the preceding section, such person so offending shall be guilty of felony, and on conviction in the superior or criminal court of a county through which the railroad of any company against which such offense may be perpetrated passes, shall be imprisoned in the state's prison for not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars.

Code, s. 1019; 1870-1, c. 103, s. 2.

3380. Partner, surviving, converting assets. If any surviving partner shall wilfully and intentionally convert any of the property, money or effects belonging to the partnership to his own use, and refuse to account for the same on settlement, he shall be guilty of a felony, and upon conviction shall be punished by fine or imprisonment in the state's prison in the discretion of the court.

1901, c. 640, s. 9.

3381. Property in possession by virtue of office or employment. If any person exercising a public trust or holding a public office, or any guardian, administrator, or executor, or any officer or agent of a corporation, or any agent, consignee, clerk or servant (except apprentices, and other persons under the age of sixteen years) of any person, shall embezzle or fraudulently or knowingly and wilfully misapply or convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently or knowingly and wilfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of felony, and punished as in cases of larceny.

Code, s. 1014; 1889, c. 226; 1891, c. 188; 1897, c. 31; 1871-2, c. 145, s. 2; 21 Hen. VII., c. 7; 39 Geo. III., c. 85; 7 and 8 Geo. IV., c. 39, s. 47; 24 and 25 Vic., c. 96, s. 68.

3382. State's bonds and securities by officer. If any officer, agent or employee of the state, or other person having or holding in trust for the same any bonds issued by said state, or any security, or other property and effects of the same, shall embezzle or knowingly and wilfully misapply or convert the same to his own use, or otherwise wilfully or corruptly abuse the said trust, such offender and all persons aiding and abetting, or otherwise assisting therein, shall be guilty of felony, and fined not less than ten thousand dollars, or imprisoned in the state's prison not less than twenty years, or both, at the discretion of the court.

Code, s. 1015; 1874-5, c. 52.

3383. Trust funds by officers. If any officer, agent, or employee of any city, county, or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational insti-

tution, shall embezzle or otherwise wilfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of felony, and fined and imprisoned in the state's prison in the discretion of the court. If any clerk of the superior court, any sheriff, treasurer, register of deeds or other public officer of any county or town of the state shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony. The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successor in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. The punishment shall be imprisonment in the state's prison or county jail, or fine, in the discretion of the court.

Code, s. 1016; 1891, c. 241; 1876-7, c. 47.

3384. Treasurer of benevolent society. If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation, to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court.

Code, s. 1017; 1879, c. 105.

3385. Taxes. If any officer appropriates to his own use the state, county, school, city or town taxes, he shall be guilty of embezzlement, and may be punished not exceeding five years in the state's prison at the discretion of the court.

Code, s. 3795; 1883, c. 136. s. 49.

XII. FENCES.

3386. Removal of common. If any person owning, occupying, cultivating or being in possession of any lands under a common fence protecting the lands, crops or property of others, shall remove such fence or any part thereof during the time in which any crops are growing or being actually cultivated thereon, or property is protected by such fence, and before such crops are harvested, without

the consent and permission of such person or persons whose crop or property is protected by such common fence, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that the provisions of this section shall not apply when ninety days' notice of such removal shall have been given to all persons owning, cultivating or in possession of lands surrounded by such common fence, or having property protected thereby, and when thereafter such fence shall be removed between the first day of January and the first day of March following such notice of intended removal.

1903, c. 20.

3387. In stock law territory. If any person wilfully tears down, or in any manner breaks a fence or gate, or leaves open a gate erected around a stock law territory, or wilfully breaks any enclosure within any township, district or county where a stock law is in force, and wherein any stock is confined, so that the same may escape therefrom, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 2820; 1889, c. 504.

3388. Wire, destroying. If any person shall wilfully destroy, cut or injure any part of a wire fence or a fence composed partly of wire and partly of wood situated on the land of another, he shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not exceeding thirty days or fined not exceeding fifty dollars.

1889, c. 516.

XIII. FISHING.

3389. Fisheries, injury to. If any person shall wilfully destroy or injure any platform or structure on any land covered by navigable waters, which land has been duly entered and granted and over which the owner has, according to law, acquired a prior right of fishery, or shall interfere with or molest the owner in the use thereof or of said prior right of fishery, he shall be guilty of a misdemeanor.

Code, s. 2753; 1874-5, c. 183, ss. 2, 3, 4.

3390. Injuring platforms erected for. If any person shall wilfully destroy or injure any platform or structure erected in any navigable water by the owner of the adjoining land for the purpose of drawing or hauling nets or seines thereon, or shall interfere with or molest the owner in the use of any such lands, he shall be guilty of a misdemeanor.

Code, s. 2753; 1874-5, ss. 2, 3, 4.

3391. In Cape Fear by nonresidents. If any person who is a nonresident of the state shall catch fish, for marketable purposes, in the waters of the Cape Fear river, or any of its tributaries, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court.

1895, c. 230.

3392. Poisoning streams to kill fish. If any person shall put any poisonous substance for the purpose of catching, killing or driving off any fish in any of the waters of a creek or river, he shall be guilty of a misdemeanor.

Code, s. 1094; 1883, c. 290.

3393. Trout, catching with seines, shooting. If any person shall catch mountain trout by seining at any time, or shall take them by shooting or otherwise between the fifteenth day of October and the thirtieth day of December, he shall be guilty of a misdemeanor.

Code, s. 1122; 1869-70, c. 142.

XIV. FORGERY.

3394. Bank-note, check, etc. If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this state, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or on the cashier thereof; or any of the securities purporting to be issued by or on behalf of the state, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the state, the person so offending shall be guilty of felony and punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, or fined in the discretion of the court.

Code, s. 1030; R. C., c. 34, s. 60; 1819, c. 994, s. 1.

3395. Bank-notes, connecting different parts of. If any person shall fraudulently connect together different parts of two or more bank-notes, or other genuine instruments, in such a manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged.

Code, s. 1037; R. C., c. 34, s. 66.

3396. Certificates of stock by officer of corporation. If any officer or agent of a corporation shall, falsely and with a fraudulent purpose, make, with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is certified or declared that such person, or holder, or bearer, is entitled to or has interest in the stock of such corporation, when in fact such person, holder, or bearer, is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified: or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue shall transfer, assign, or deliver the same to another person, for the sake of gain, or with the intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall be imprisoned in the county jail or state's prison not less than four months nor more than ten years.

Code, s. 1032; R. C., c. 34, s. 62.

3397. Counterfeiting coin. If any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any coin of gold or silver, which is in common use and received in the discharge of contracts by the citizens of the state; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the state from any other place, with intent to pass, utter, publish, or sell as true, any such false, forged, or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any person whatsoever, every person so offending shall be guilty of a felony, and punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years.

Code, s. 1035; R. C., c. 34, s. 64; 1811, c. 814, s. 3.

3398. Counterfeiting, possession of tools for. If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other coin made of gold or silver, which is in common use and received in discharge of contracts by the citizens of the state and shall be duly convicted thereof, the person so offending shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years.

Code, s. 1036; R. C., c. 34, s. 65; 1811, c. 814, s. 4.

3399. Deeds and other papers. If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to be forged or made, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof; or any acquittance, or receipt for money or goods; or any receipt, or release for any bond, note, bill, or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, or fined in the discretion of the court.

Code, s. 1029; R. C., c. 34, s. 59; 1801, c. 572; 5 Eliz., c. 14, ss. 2, 3; 21 James I., c. 26 (A. D. 1623).

3400. Judgments, securities, etc., selling same. If any person shall sell, by delivery, indorsement, or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a justice of the peace, or any bond, promissory note, bill of exchange, order, draft, or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years.

Code, s. 1033; R. C., c. 34, s. 63.

3401. Names to petitions; using such petitions. If any person shall wilfully sign, or cause to be signed, or wilfully assents to the signing of the name of any person without his consent, or of any deceased or fictitious person to any petition or recommendation with the intent of procuring any commutation of sentence, pardon, or reprieve of any person convicted of any crime or offense, or for the purpose of procuring such pardon, reprieve or commutation, to be refused or delayed by any public officer, or with the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, he shall be guilty of a felony, and fined not exceeding one thousand dollars, or imprisoned in the county jail or state's prison not exceeding five years, or both, at the discretion of the judge; and if any person shall wilfully use any such paper for any of the purposes or intents above recited, knowing that any part of the sig-

natures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names of any dead or fictitious persons are signed thereto, he shall be guilty of a felony, and punished in like manner.

Code, s. 1034; 1883, c. 275.

3402. Uttering forged paper. If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check, or security, as is mentioned in the preceding section; or shall pass, or deliver, or attempt to pass, or deliver any of them to another person (knowing the same to be falsely forged or counterfeited), the person so offending shall be punished by imprisonment in the county jail or state's prison, not less than four months nor more than ten years.

Code, s. 1031; R. C., c. 34, s. 61; 1819, c. 994, s. 2.

NOTE. Presentation of false certificate of exemption from taxes, see sec. 3376.

XV. FRAUDS.

3403. Blackmailing. If any person shall knowingly send or deliver any letter or writing demanding of any person, with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing or threatening to accuse any person of any crime punishable by law with death, or imprisonment in the state's prison, with a view or intent to extort or gain from such person any chattel, money, or valuable security, every such offender shall be guilty of a misdemeanor.

Code, s. 989; R. C., c. 34, s. 110.

3404. Fairs, fraudulent entry of horses at. If any person shall knowingly enter or cause to be entered for competition or to compete for any purse, prize, premium, stake or sweep-stake offered or given by any agricultural or other society, association or person in this state any horse, mare, gelding, colt or filly under an assumed name or out of its proper class, he shall be punished by fine of not less than two hundred nor more than one thousand dollars, or imprisonment in the state's prison for not less than one nor more than five years, or both fine and imprisonment, at the discretion of the court.

1893, c. 387.

Note. See s. 3658.

3405. False lights on seashore. If any person shall make or display, or cause to be made or displayed, any false light or beacon

on or near the seacoast, for the purpose of deceiving and misleading masters of vessels, and thereby put them in danger of shipwreck, he shall be guilty of a felony, and imprisoned in the state's prison for not less than four months nor more than ten years.

Code, s. 1024; R. C., c. 34, s. 58; 1831, c. 42.

3406. False pretense; obtaining advances under promise to work. If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description, from any other person or corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for said person or corporation from whom said advances are obtained, and said person so making said promise or agreement shall unlawfully and wilfully fail to commence or complete said work according to contract without a lawful excuse, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1889, c. 444; 1891, c. 106.

3407. False pretense; cheating by. If any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretense whatsoever, obtain from any person or corporation within the state any money, goods, property, or other thing of value, or any bank-note, check, or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this state, or any of the United States, or on any treasury warrant, debenture, certificate of stock, or public security, or any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a felony, and imprisoned in the state's prison not less than four months nor more than ten years, or fined, in the discretion of the court: Provided, that if, on trial of any one indicted for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of the felony; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny upon the same facts: Provided further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of

any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

Code, s. 1025; R. C., c. 34, s. 67; 1811, c. 814, s. 2; 24 and 25 Vic., c. 96, s. 88; 33 Hen. VIII., c. 1, ss. 1, 2; 30 Geo. II., c. 24, s. 1; 52 Geo. III., c. 64, s. 1; 7 and 8 Geo. IV., c. 29, s. 53.

3408. False pretense; obtaining signature by. If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, or obtain from any person any money, goods, wares, merchandise or other property or valuable thing whatsoever, he shall be punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the state's prison for a term not less than one year nor more than five years, or both, at the discretion of the court.

Code, s. 1026; 1871-2, c. 92.

3409. False pretense; obtaining advances by. If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description, from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel, or personal property, which property, or the proceeds of which the owner in such representation thereby agrees to apply to the discharge of the debt so created and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made. This offense shall be punishable as in the preceding section.

Code, s. 1027; 1879, cc. 185, 186.

3410. Mortgaged property, disposing of; indictment; proof. If any person, after executing a chattel mortgage, deed in trust or other lien for a lawful purpose, shall make any disposition of any personal property embraced in such mortgage, deed in trust or lien, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit such deed was made, every person so offending and every person with a knowledge of the lien buying the property embraced in any such deed or lien, and every person assisting, aiding or abetting the unlawful disposition of such property, with intent to hinder, delay or defeat the rights of any person to

whom or for whose benefit any such deed or lien was made, shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court. In all indictments for violations of the provisions of this section, it shall not be necessary to allege or prove the person to whom any sale or disposition of the property was made, but proof of the possession of the property embraced in such chattel mortgage, deed in trust or lien, by the grantor thereof, after the execution of said chattel mortgage, deed in trust or lien, and while it is in force, and further proof of the fact that the sheriff or other officer charged with the execution of process can not after due diligence find said property under process directed to him for its seizure, for the satisfaction of such chattel mortgage, deed in trust or lien, or that the mortgagee demanded the possession thereof of the mortgagor for the purpose of sale to foreclose said mortgage, deed in trust or lien, after the right to such foreclosure had accrued, and that the mortgagor failed to produce, deliver or surrender the same to the mortgagee for that purpose, shall be *prima facie* proof of the fact of a disposition or sale of such property, by the grantor, with the intent to hinder, delay or defeat the rights of the person to whom said chattel mortgage, deed in trust or lien was made.

Code, s. 1089; 1887, c. 14; 1873-4, c. 31; 1874-5, c. 215; 1883, c. 61.

3411. Secreting property to hinder enforcement of lien. Any person removing, exchanging, or secreted any personal property on which a lien exists, with intent to prevent or hinder the enforcement of the lien, shall be guilty of a misdemeanor.

1887, c. 14.

XVI. GOVERNMENT.

3412. Rebellion against the state. If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the state of North Carolina or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid, shall be guilty of a felony and punished by imprisonment in the state's prison for not more than fifteen years, and be fined not more than ten thousand dollars.

Code, s. 1106; 1868, c. 60, s. 2; 1861, c. 18; 1866, c. 54; Const., Art. IV, s. 5.

3413. Rebellion or insurrection, conspiracy for. If two or more persons shall conspire together to overthrow or put down, or to destroy by force, the government of North Carolina, or to levy war against the government of this state, or to oppose by force the authority of said government, or by force, or by threats, to intimidate, or to prevent, hinder or delay the execution of any law of the state,

or by force or fraud to seize or take possession of any firearms or property of the state aforesaid, against the will or contrary to the authority of said state, every person so offending in any of the ways aforesaid shall be guilty of a felony and imprisoned not more than ten years in the state's prison and be fined not exceeding five thousand dollars.

Code, s. 1107; 1868, c. 60, s. 1.

3414. Secret political societies. If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character, or shall form or organize or combine and agree with any other person or persons to form or organize any such organization, or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or passwords, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object, and shall take or administer any extra-judicial oath or other secret, solemn pledge, or any like secret means, or if any two or more persons, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or for circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever; or shall take or administer any extra-judicial oath or other secret, solemn pledge, or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction, or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control, or if any person being a member of any such secret political or military organization shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and fined not less than ten nor more than two hundred dollars, or be imprisoned, or both, at the discretion of the court.

Code. s. 1095: 1870-1, c. 133; 1868-9, c. 267; 1871-2, c. 143.

XVII. HEALTH.

3415. Board of health to notify school committees of contagious diseases. The boards of health of cities and towns wherever organized, and, where not, the mayors of the same, and in other cases the county superintendent of health, shall give the school committee of the city or town, the principals of private schools and the superintendent of public instruction of the county, when the schools are in session, notice of all cases of contagious diseases reported to them according to law. A failure to perform this duty for twenty-four hours after the receipt of the notice shall be deemed a misdemeanor, and subject the delinquent upon conviction to a fine of not less than ten nor more than fifty dollars.

1893, c. 214, s. 12.

3416. Children exposed to contagious diseases not to attend schools. The school committees of public schools, superintendents of graded schools, and principals of private schools shall not allow any pupil to attend the school under their control while any member of the household to which said pupil belongs is sick of either smallpox, diphtheria, measles, scarlet fever, yellow fever, typhus fever, cholera, mumps, whooping-cough, itch, or during a period of two weeks after the death, recovery or removal of such sick person; and any pupil coming from such household shall be required to present to the teacher of the school the pupil desires to attend a certificate from the attending physician, city health officer or county superintendent of health of the facts necessary to entitle him to admission in accordance with the above regulations. A wilful failure on the part of any school committee, superintendent of a graded school or principal of a private school, to perform the duty required in this section shall be deemed a misdemeanor, and upon conviction shall subject each and every member of the same to a fine of not less than one nor more than twenty-five dollars: Provided, that the instructions in accordance with the provisions of this section given to the teachers of the schools within twenty-four hours after the receipt of each and every notice shall be deemed performance of duty on the part of the school committee. Any teacher of a public school and any principal of a private school failing to carry out the requirements of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one nor more than twenty-five dollars.

1893, c. 214, s. 13; 1903, c. 690.

3417. Householder failing to give notice of contagious disease. If a householder knows that a person within his family is sick with either smallpox, diphtheria, scarlet fever, yellow fever, typhus fever, or cholera, he shall immediately give notice thereof to the health

officer or mayor, if he resides in a city or incorporated town, otherwise to the county superintendent of health, and upon the death or recovery or removal of such person, the rooms occupied and the articles used by him shall be disinfected by such householder in the manner indicated in printed instructions furnished by the secretary of the state board of health. Any person neglecting or refusing to comply with any of the above provisions shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one dollar nor more than fifty dollars.

1893, c. 214, s. 10.

3418. Physician and county superintendent to give notice of contagious diseases. If a physician knows that a person whom he is called to visit is infected with smallpox, diphtheria, scarlet fever, typhus fever, yellow fever or cholera he shall immediately give notice thereof to the health officer or mayor, if the sick person be in a city or incorporated town, otherwise to the county superintendent of health, and if he refuses or neglects to give such notice of it in twenty-four hours he shall be guilty of a misdemeanor and shall be fined for each offense not less than ten nor more than twenty-five dollars. And it shall be the duty of the said county superintendent, health officer or mayor receiving such notice of the presence of a case of smallpox, yellow fever, typhus fever or cholera within his jurisdiction to communicate the same immediately by mail or telegraph to the secretary of the state board of health. A failure to perform this duty for twenty-four hours after the receipt of the notice shall be deemed a misdemeanor and fined not less than ten nor more than twenty-five dollars.

1893, c. 214, s. 11.

3419. Quarantine regulations. If any person shall neglect or refuse to comply with or in any way violate the rules promulgated by the county superintendent of health on the subjects of quarantine and disinfection, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court, not less than five nor more than fifty dollars, or imprisoned not less than ten nor more thirty days. In case the offender be stricken with the disease for which he is quarantinable, he shall be subject to the penalty on recovery, unless in the opinion of the superintendent it should be omitted.

1893, c. 214, s. 9.

3419a. Quarantine regulations, Cape Fear river. If any person shall violate any of the rules and regulations made by the quarantine board for the control, government and maintenance of the quarantine station on Cape Fear river, he shall be guilty of a misdemeanor.

1893, c. 505.

3419b. Quarantine regulations; vessels. If any vessel shall come into the state from any place which at the time of her departure was infected with any infectious disease, or if such vessel shall have on board, or shall have had on board during her passage, any infectious disease, and shall come to any town, or into its harbor, without permission obtained as required by law, the pilot or master, conducting the vessel, or ordering or permitting her to be conducted to such town or harbor, shall be guilty of a misdemeanor, and fined not less than one thousand dollars, and imprisoned not exceeding one year.

Code, s. 2894; R. C., c. 94, s. 2.

3420. Rules of sanitary committee. If any person shall violate the rules and regulations made by the county sanitary committee, he shall be guilty of a misdemeanor and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

1901, c. 245, s. 3.

3421. Travelers coming from infected places. The board of health, or in case there is no board of health, the board of aldermen or town commissioners of a city or town, or the sanitary committee of a county, near to or bordering upon either of the neighboring states, may appoint, by writing, suitable persons to attend at places by which travelers may pass from infected places in other states, who may examine such travelers as may be suspected of bringing any infection dangerous to the public health, and if it need be may restrain them from traveling until licensed thereto by the board of health or board of aldermen or town commissioners of the city or town to which they may come. A traveler coming from such infected place who, without such license, travels within this state (except to return by the most direct route to the state whence he came) after he has been cautioned to depart by the persons so appointed, shall be isolated or ejected, at the discretion of the local city or town board of health, or county sanitary committee; and upon refusal to comply with the regulations of the said boards of health, or either of them, on this subject shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five nor more than fifty dollars or imprisoned not more than thirty days.

1893, c. 214, s. 15; 1901, c. 245, s. 6.

3422. Food misbranded or adulterated. If any person shall himself or by an agent or employee manufacture, sell, expose for sale, or have in his possession with intent to sell any article of food which is adulterated or misbranded, he shall be guilty of a misdemeanor, and shall be fined not exceeding two hundred dollars or

be imprisoned not exceeding one year, or both. The term food as used in this section shall include all articles used for food—candy, condiment or drink, by man or domestic animal, whether simple, mixed or compound. The term misbranded as used in this section shall include all articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement purporting to name any ingredients or substances as being contained or not being contained in such article, which statement shall be false in any particular.

For the purpose of this section an article of food shall be deemed adulterated—

1. If any substance or substances has or have been mixed or packed with it, so as to reduce or lower or injuriously affect its quality or strength so that such product when offered for sale shall deceive or tend to deceive the purchaser.

2. If any inferior substance has been substituted wholly or in part for the article so that the product when sold shall deceive or tend to deceive the purchaser.

3. If any valuable constituent of the article has been wholly or in part abstracted so that the product when sold shall deceive or tend to deceive the purchaser.

4. If it be an imitation of, and sold under the specific name of another article.

5. If it be mixed, colored, powdered, coated, polished or stained in a manner whereby damage or inferiority is concealed, so that such product when sold shall deceive or tend to deceive the purchaser.

6. If it contain any added poisonous ingredient, or any ingredient which may render such article injurious to the health of the person consuming it.

7. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when branded so, or in an imitation either in package or label of an established proprietary product, which has been trade-marked or patented.

8. If it consists of the whole or any part of a diseased, filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or of an animal that has died otherwise than by slaughter.

9. That candies and chocolate may be deemed to be adulterated if they contain terra alba, barytes, talc, chrome yellow or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health: Provided, that an article of food, beverage, or condiment which does not contain any added

poisonous ingredient shall not be deemed to be adulterated in the following cases:

(a) In the case of articles, mixtures or compounds which may be now, or from time to time hereafter, known as articles of food, beverages or condiments under their own distinctive names, and not included in definition fourth of this section.

(b) In the case of articles, labeled, branded or tagged so as to plainly indicate that they are mixtures, compounds, combinations, imitations or blends.

(c) When any matter or ingredient has been added to the food, beverage or condiment because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight or measure of the food, beverage or condiment, or conceal the inferior quality thereof: Provided, that the same shall be labeled, branded or tagged as prescribed by the board of agriculture so as to show them to be compounds and the exact character thereof: And provided further, that nothing in this section shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods to disclose their trade formulas except in so far as the provisions of this section may require to secure freedom from adulteration or imitation: Provided further, that nothing in this section shall be construed to apply to proprietary or patent medicines.

(d) Where the food, beverage or condiment is unavoidably mixed with some harmless extraneous matter, in the process of collection or preparation: Provided, that no person shall be convicted under the provisions of this section when he is able to prove a written guaranty of purity in a form approved by the board of agriculture as published in their rules and regulations, signed by the wholesale jobber, manufacturer or other party from whom he purchased said article.

1895, c. 122; 1899, c. 86, ss. 2, 5, 6; 1899, c. 369.

3422a. Foods; refusal to furnish samples for analysis. If any manufacturer or dealer shall refuse to sell to a duly authorized agent of the board of agriculture samples of articles of food made or offered for sale upon demand, or, if any manufacturer, dealer or person shall impede, obstruct, hinder or otherwise prevent or attempt to prevent any chemist, inspector or other person in the performance of his duty in connection with the law in regard to sale of adulterated and unbranded foods, he shall be guilty of a misdemeanor and shall, upon conviction, be fined not less than ten dollars nor more than one hundred dollars, or be imprisoned not more than one hundred days, or both, in the discretion of the court.

1899, c. 86, s. 10.

3422b. Nuisance, failure to abate. If any person, after having received a notification in writing from the county superintendent of health of any nuisance on the premises occupied by him, or any unoccupied premises belonging to him which is dangerous to public health, shall fail to abate the same for twenty-four hours after such notice is received he shall be guilty of a misdemeanor and shall be fined one dollar a day so long as said nuisance remains.

1893, c. 214, s. 22.

3423. Obstructing inspector in performance of duty. If any manufacturer or dealer shall impede, obstruct, hinder, or otherwise prevent any inspector or chemist or other person, in the performance of his duty in the securing of samples, or the analysis of samples of articles of condiments, beverages, or foods sold, or offered or exposed for sale in this state, as required by law, he shall be guilty of a misdemeanor and be fined not exceeding one hundred dollars, or be imprisoned not exceeding one hundred days, or both.

1889, c. 86, s. 10.

3424. Refusal to sell sample of food. If any person, who manufactures, sells or exposes for sale any condiment, beverage, or article of food, shall, upon tender and full payment of the selling price, during business hours, fail or refuse to furnish to any person duly authorized by the board of agriculture to secure a sample of such condiment, beverage or article of food for analysis, such sample for such use in sufficient quantity for analysis, he shall be guilty of a misdemeanor and be fined not exceeding one hundred dollars, or be imprisoned not exceeding one hundred days, or both in the discretion of the court.

1889, c. 86, ss. 9, 10.

3424a. Vaccination, rules in regard to. If any person shall violate any of the rules and regulations of the sanitary authorities of any county in regard to vaccination, he shall be guilty of a misdemeanor and fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1983, c. 214, s. 23; 1901, c. 245, s. 7.

3425. Water supply, damage to. If any person shall wilfully put into the well, spring or cistern of water of any other person any substance or thing whereby such well, spring or cistern may be endangered, or the water thereof be made less wholesome or fit for use, he shall be guilty of a misdemeanor.

Code, s. 1114; R. C., c. 34, s. 97; 1850, c. 104.

3425a. Water supply, damage to. If any person shall wilfully or maliciously defile, corrupt or make impure any well, spring or

other source of water-supply or reservoir, or destroy or injure any pipe, conductor of water or other property pertaining to an aqueduct, or shall aid and abet therein, he shall be guilty of a misdemeanor.

Code, s. 1114; R. C., c. 34, s. 97; 1893, c. 214; 1850, c. 104.

3426. Water supply of public institutions. If any person shall in any way intentionally or maliciously damage or obstruct any water line of any public institution, or in any way contaminate or render the water impure or injurious, he shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court.

1893, c. 63, s. 3.

NOTE. For watersheds, see ss. 3792-3797.

XVIII. *HUNTING.*

3427. Hunting on land of another. If any person shall, without having first obtained permission of the owner, hunt with gun or dogs on the land of another, or if he shall fish or attempt to catch fish from said lands after being forbidden, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Code, s. 2831; 1895, c. 147.

3428. Netting quail in certain counties. If any person shall net or trap any quail or partridge in Stokes, Randolph, or Burke county except on his own land, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

1897, c. 77; 1899, c. 157; 1901, c. 61; 1903, c. 86.

3429. Hunting wild fowl with fire. If any person shall hunt wild fowl, or game birds of any kind, with fire, he shall be guilty of a misdemeanor and upon conviction be fined not less than twenty and not more than fifty dollars, or imprisoned not less than ten days and not more than thirty days.

Code, s. 2839.

3430. Hunting before daylight and after sunset. If any person shall hunt or shoot any wild fowl, or game bird, on any day after the hour of sunset, or before the hour of daylight, or shall use any gun other than can be fired from the shoulder, or shall hunt or shoot wild fowl, birds or game of any kind on Sunday, he shall be guilty of a misdemeanor: Provided, that wild fowl may be hunted after sunset and before daylight and by firelight in that part of Bogue sound in Carteret county, west of Sally Bell's shoal.

Code, s. 2837; 1903, c. 46.

3431. Nonresidents hunting without license. If any nonresident shall hunt in the state without license, as required by law, or shall hunt upon the lands of another without his written consent, or shall fail to carry his license with him in hunting, or shall fail upon demand to exhibit it to any game warden or police officer, he shall be guilty of a misdemeanor. Each day's hunting without license shall be a separate offense.

1903 (Pr.), c. 337, s. 10.

3432. Killing game out of season. If any person shall at any time hunt, capture or kill any nongame bird, or shall during the close season, or time in each year in which the hunting or killing is prohibited, chase with dogs, hunt, kill, or wound, or in any manner take or capture any game bird, or any deer, opossum, rabbit or squirrel, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not exceeding thirty days: Provided, this section shall not apply to birds caught by authority of the Audubon Society for scientific purposes only. This section shall not apply to the English or European house-sparrow, owls, hawks, crows, blackbirds, jackdaws, and rice birds.

Code, ss. 2832, 2834; 1903 (Pr.), c. 337, s. 14.

Note. For close season, see chapter Hunting.

3433. Destroying nests or eggs of birds. If any person shall take or needlessly destroy the nest or eggs of any wild birds, except those of the English or European house-sparrow, owls, hawks, crows, blackbirds, jackdaws and rice birds he shall be guilty of a misdemeanor and be fined one dollar for each nest or egg destroyed or taken, or be imprisoned not less than five nor more than ten days for each offense. This section shall not apply to any person taking eggs or nests for scientific purposes only, by authority of the Audubon Society of North Carolina.

Code, s. 2836; 1903 (Pr.), c. 337, s. 4.

3434. Shipping certain birds. If any person shall knowingly receive for transportation, or shall transport or cause to be transported, or have in his possession with the intent to transport, or to secure the transportation of beyond the limits of this state, except for purposes of propagation under permits issued by the Audubon Society of North Carolina, any partridge, pheasant, quail, wild turkey, snipe, woodcock, or nongame bird which have been killed or captured within this state, he shall be guilty of a misdemeanor; and each bird so killed or taken or had in possession, received for transportation or transported contrary to the provisions of this section shall constitute a separate offense. The reception by any person or corporation within this state of any such birds or game for

shipment to a point beyond the limits of this state, shall be prima facie evidence that said birds or game were killed within the state for the purpose of conveying same beyond its limits; but the provisions of this section shall not apply to the common carriers into whose possession any of the birds mentioned in this section shall come in the regular course of their business for transportation while they are in transit through the state from any place without the state.

1903 (Pr.), c. 337, s. 7; Code, s. 2835.

3435. Packages of game to be marked. If any person shall deliver or knowingly receive for transportation any receptacle or package containing birds or game, unless the same shall be labeled on the address side in plain letters with the name and address of the owner and consignor, and with the kind or kinds of birds which the said package or receptacle contains, or shall falsely label the same, he shall be guilty of a misdemeanor.

1903 (Pr.), c. 337, s. 8.

3436. Wild fowl in Pamlico sound, Hyde county. If any person shall shoot any wild fowl in the waters of Pamlico sound, in Hyde county, from any box, battery or float not on land at the time, he shall be guilty of a misdemeanor: Provided, residents of the state may shoot from batteries not on land on Monday, Tuesday, Thursday and Friday of each week and on no other days.

1897, c. 484.

3437. Wild fowl in New Hanover and Brunswick counties. If any person shall kill, for sale, any wild fowl in the waters of Dare, New Hanover or Brunswick counties between the tenth days of March and November of any year, or ship out of the state between said dates any wild fowl killed in the waters aforesaid, or if any nonresident shall in said counties, or in Currituck county, shoot any wild fowl from any blind, box or battery or float, not on land at the time, he shall be guilty of a misdemeanor and be fined not more than fifty dollars, or imprisoned not more than thirty days.

Code, s. 2840; 1889, c. 59.

3438. Wild fowl, Currituck county. If any person shall put bushes or blinds of any kind on their boats or floats of any kind with intent to decoy or pursue ducks, or shall, after putting out decoys, sail, row, or in any manner propel a boat after wild fowl to put them on the wing, or shoot them with rifle or shotgun from any boat while sailing, or shall place any sail, flag, or other device upon any land bordering on the water to frighten any wild fowl, or shall leave more than one stationary bush or blind standing in the water

between the hours of dark and sunrise, or shall fail to anchor any deeked boat or float-house, or house built over the water and used to live in for the purpose of fishing or hunting wild fowl, in shoal water not more than three hundred yards from the mainland on the west side of Currituck sound, or at some public landing on the east side between the north end of Church's island and the south end of Powell's point at dark, or shall at dark fail to go to some landing as aforesaid, or shall leave any landing or anchorage before sunrise in the morning for the purpose of hunting or fishing, or shall before sunrise put out any decoys of any kind, or nets, or shall continue to hunt or fish after dark, or shall, between the thirty-first day of March and the tenth day of November of any year, shoot or capture any wild fowl over decoys, or shall between the tenth day of November of any year and the thirty-first day of March of the next year on any Wednesday, Saturday or Sunday hunt, take, kill or capture any wild fowl, or on any of said days shall disturb or rout any raft of wild fowl unless the same be unavoidable in the usual course of navigation, or shall between the tenth day of November and the fifteenth day of February skiff or ring-shoot any boobies or ruddy duck, or shall between the thirty-first day of March and the tenth day of November ship out of the county any wild fowl, or shall sail or propel a boat on Sunday for the purpose of locating wild fowl, or if any hired or employed person shall sail or lay around anywhere near any citizen who may be gunning or fishing to damage his shooting or keep him from shooting, he shall be guilty of a misdemeanor. This section shall only apply to Currituck county.

1889, c. 59; 1889, c. 115; 1889, c. 126; 1893, c. 286; 1895, c. 299; 1897, c. 291; 1899, c. 245; 1903, c. 112; 1903, c. 136.

3439. Hunting wild fowl in Dare county without license. If any nonresident shall hunt wild fowl in Dare county without having paid the license tax required by law, or if any person shall hunt wild fowl in said county in any manner not authorized by law, he shall be guilty of a misdemeanor.

1897, c. 415; 1899, c. 133.

3441. Wild fowl in Dare county. If any nonresident of this state shall shoot wild fowl from any boat or floating battery in the waters of that part of Dare county which lies south of a line passing east and west through the extreme northern end of Roanoke island, unless within four miles of some clubhouse or lodge of which he is a member or guest, or from some licensed boat or battery from which non-residents are by law authorized to shoot wild fowl, he shall be guilty of a misdemeanor.

1899, c. 133, s. 2; 1904, c. 157.

3442. Wild fowl, Carteret county. If any person shall hunt or shoot wild fowl with or from batteries or sneak boats in Carteret county between the first day of April and the first day of December of any year, or if any person shall shoot or hunt wild fowl from batteries or sneak boats in that part of Bogue sound, Carteret county, at any season of the year, he shall be guilty of a misdemeanor and be fined not less than ten dollars and not more than fifty dollars, or imprisoned not more than thirty days.

1903, c. 346.

3443. Chasing deer with dogs, certain counties. If any person shall chase deer with dogs in Clay, Graham, Macon or Swain county, he shall be guilty of a misdemeanor.

1903, c. 591.

3444. Hunting deer by firelight. If any person shall hunt for deer with a gun in the woods in the night time, by firelight, the person so offending shall be guilty of a misdemeanor and shall pay a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days.

Code, s. 1058; R. C., c. 34, s. 95; 1784, c. 212, ss. 1, 3; 1801, c. 595; 1856-7, c. 24; 1879, c. 92.

3445. Hunting by firelight, evidence of accomplices. When more persons than one are engaged in committing the offense of fire-hunting, any one may be compelled to give evidence against all others concerned; and the witness, upon giving such information, shall be acquitted and held discharged from all penalties and pains to which he was subject by his participation in the offense.

Code, s. 1059; R. C., c. 34, s. 96; 1774, c. 103.

XIX. INSURANCE.

3446. Adjuster acting for unauthorized company. If any person shall act as adjuster on a contract made otherwise than authorized by the laws of this state, or by any insurance company or person not regularly licensed to do business in the state, or shall adjust or aid in the adjustment, either directly or indirectly, of a loss by fire on property located in this state, incurred on a contract not authorized by the laws of the state, he shall be deemed guilty of a misdemeanor and shall upon conviction be fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned not less than six months nor more than two years, or both, in the discretion of the court.

1899, c. 54, s. 114.

3447. Agent procuring insurance in unauthorized company, and failing to file statement and affidavit. If any person licensed to procure insurance in an unauthorized foreign company shall procure, or act in any manner in the procurement or negotiation of insurance in any unauthorized foreign company, and shall neglect to make and file the affidavit and statements required by law, he shall forfeit his license and be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than one year, or by both.

1899, c. 54, ss. 68, 95.

3448. Agent acting without license. If any person shall assume to act as an insurance agent or insurance broker without license therefor as required by law, or shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this state, or as principal or agent shall violate any provision of the law in regard to the negotiation or effecting of contracts of insurance, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than five hundred dollars for each offense.

1899, c. 54, s. 94.

3449. Agent to exhibit license. If any agent of any insurance company shall, on demand of any person from whom he shall solicit insurance, fail to exhibit a certificate from the insurance commissioner bearing the seal of his office, and dated within one year from such demand, he shall be fined five dollars or imprisoned ten days for each offense.

1899, c. 54, s. 81.

3450. Agent obtaining premiums by false representations. If any insurance agent or broker knowingly procures by fraudulent representations payment, or the obligation for the payment of a premium of insurance, he shall be punished by a fine of not less than one hundred nor more than five hundred dollars or be imprisoned for not more than one year.

1899, c. 54, s. 69.

3451. Agents, etc., making false statements. If any solicitor, agent, examining physician or other person shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any publication for insurance, or shall make any such statement for the purpose of obtaining fee, commission, money or benefit in any corporation transacting business in this state, he shall be guilty of a misdemeanor, and upon conviction shall

be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days nor more than one year, or both, at the discretion of the court; and if any person shall wilfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a policy or certificate holder in any such corporation, for the purpose of procuring payment of a benefit named in the certificate of such holder, he shall be guilty of perjury.

1899, c. 54, s. 60.

3452. Agents signing certain blank policies. If any agent, commissioned or otherwise, of any steam-boiler, liability, accident, plate-glass, or fidelity insurance company shall sign any blank contract or policy of insurance, upon conviction thereof he shall be fined for each offense not less than one hundred dollars nor more than two hundred dollars.

1899, c. 54, ss. 108, 109.

3453. Agent guilty of larceny. If any insurance agent or broker who acts in negotiating a contract of insurance by an insurance company lawfully doing business in this state embezzles or fraudulently converts to his own use, or, with intent to use or embezzle, takes, secretes, or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests, or otherwise uses or applies any money or substitute for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, he shall be deemed guilty of larceny.

1889, c. 54, s. 103.

3454. Agent violating insurance law. If any person, either as principal or agent, or pretending to be such, shall solicit, examine or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, or shall receive, collect or transmit any premium of insurance, or shall do any other act in the soliciting, making or executing any contract of insurance of any kind otherwise than the law permits, he shall be deemed guilty of a misdemeanor, and on conviction shall pay a fine of not less than two hundred dollars nor more than five hundred dollars, or be imprisoned not less than one nor more than two years, or both, at the discretion of the court.

1899, c. 54, s. 115.

3455. Company advertising assets without liabilities. If any company or any agent thereof issues or circulates advertisements in which any such company publishes its assets and does not in the

same connection and with equal conspicuousness publish its liabilities computed on the basis allowed for its annual statements, or any publication purporting to show its capital which exhibits more than the amount of such capital as has been actually paid in cash, it or he shall be punished by a fine of not less than fifty nor more than two hundred dollars.

1899, c. 54, ss. 18, 96.

3456. Company making false statement. If any insurance company in its annual or other statement required by law shall wilfully misstate the facts, the insurance company and the person making oath to or subscribing the same shall severally be punished by a fine of not less than five hundred nor more than one thousand dollars. Any person making oath to such false statement shall be guilty of the crime of perjury.

1899, c. 54, s. 97.

3456a. Failure to exhibit books on demand. If any person having in his possession or control any books, accounts or papers of any person licensed under the insurance law shall, on demand refuse to exhibit the same to the insurance commissioner, or shall knowingly or wilfully make any false statement in regard to the same, such person shall be deemed guilty of a misdemeanor, and, upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court.

1899, c. 54, s. 76.

3457. Fire company reinsuring in unauthorized company. If any fire insurance company shall, directly or indirectly, reinsure any risk taken by it on any property located in North Carolina in any company not duly authorized to transact business herein, the insurance agent and the company effecting or acting in the negotiation of such reinsurance shall severally be punished by a fine of five hundred dollars.

1899, c. 54, ss. 63, 98.

3458. Mutual fire, guaranteeing against assessments. If any director or other officer of a mutual fire insurance company, either officially or privately, shall give a guarantee to a policy-holder thereof against an assessment to which such policy-holder would otherwise be liable, he shall be punished by a fine not exceeding one hundred dollars for each offense.

1899, c. 54, s. 100.

3459. Reinsurance; medical examination. If any domestic life insurance company shall reinsure its risks, except by permission of

the insurance commissioner, exceeding one-half of any individual risk, or if any life insurance company organized under the laws of or doing business in this state shall enter into any contract of insurance upon lives within this state without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner, such insurance company, or any officer, agent or other person soliciting or effecting, or attempting to effect, a contract of insurance contrary to this section, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars for each offense.

1899, c. 54, s. 58.

XX. LARCENY.

3460. Bank-notes, securities, etc. If any person shall feloniously steal, take and carry away, or take by robbery, any bank-note, check, or order for the payment of money issued by or drawn on any bank, or other society or corporation within this state or within any of the United States, or any treasury warrant, debenture, certificate of stock, or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be felony of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods, or property of any value, and such offender for every such offense shall suffer such punishment, and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery money, goods, or other property of value.

Code, s. 1064; R. C., c. 34, s. 20; 1811, c. 814, s. 1.

3461. By servant. If any servant or employee to whom any money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned in the preceding section, by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with the said money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods, or other chattels, or any

of the articles, securities, or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or defraud his master thereof, the servant so offending shall be fined or imprisoned in the state's prison or county jail not less than four months nor more than ten years at the discretion of the court: Provided, that nothing in this section contained shall extend to apprentices, or servants, within the age of sixteen years.

Code, s. 1065; R. C., c. 34, s. 18; 21 Hen. VIII., c. 7, ss. 1, 2; 39 Geo. III., c. 85; 7 and 8 Geo. IV., c. 29, s. 47; 24 and 25 Vic., c. 96, s. 68.

3462. Of horse. If any person shall steal any horse, mare, gelding or mule he shall suffer imprisonment at hard labor for not less than five nor more than twenty years, at the discretion of the judge. A count under this section may be joined in a bill of indictment with a count under the succeeding section.

Code, s. 1066; 1868, c. 37, s. 1; 1879, c. 234, s. 2; 1866-7, c. 62.

3463. Temporary use of horse. If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and against the will of the owner of said property, with intent to deprive the owner of said property of the special or temporary use of the same, or with the intent to use said property for a special or temporary purpose, the person so offending shall be guilty of larceny, and punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, and fined in the discretion of the court: Provided, this section shall not be construed to repeal or in any way affect the preceding section.

Code, s. 1067; 1879, c. 234, s. 1.

3464. Live stock, felonious injury equal to. If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending.

Code, s. 1068; 1866, c. 57.

3465. Dogs subject of larceny. If any person shall feloniously take, steal and carry away any dog listed for taxation on which there is paid an annual tax of one dollar, he shall be guilty of larceny.

Code, s. 2502; 1881, c. 302.

3466. Growing crops. If any person shall steal, or feloniously take and carry away any maize, corn, wheat, rice, or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, or any fruit, vegetable, or other product cultivated for food or market, growing, standing or remaining ungathered, in any field or ground, he shall be guilty of larceny, and punished accordingly.

Code, s. 1069; 1811, c. 816; R. C., c. 34, s. 21; 1868-9, c. 251.

3467. Wood or other property on land. If any person, not being the present owner or bona fide claimant thereof, shall wilfully and unlawfully enter upon the lands of another and carry off or be engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense. And if not done with such intent, shall be guilty of a misdemeanor.

Code, s. 1070; 1866, c. 60.

3468. Records, registration books; indictment for. If any person shall steal, or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment for such offense it shall not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. And if any person shall steal, or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and wilfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration, or record required to be kept by the register of deeds, or shall unlawfully destroy, obliterate, deface or remove any record of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper writing required to be kept by the clerk of

the board of commissioners of any county, he shall be guilty of a misdemeanor.

Code, s. 1071; R. C., c. 34, s. 31; 8 Hen. VI., c. 12; 1881, c. 17.

3469. Wills. If any person, either during the life of the testator or after his death, shall steal or for any fraudulent purpose destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor.

Code, s. 1072; R. C., c. 34, s. 32.

3470. Receiving. If any person shall receive any chattel, property, money, valuable security, or other thing whatsoever, the stealing or taking whereof shall amount to larceny or felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security, or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession, or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny.

Code, s. 1074; R. C., c. 34, s. 56; 1797, c. 485, s. 2.

3471. Punishment for. In all cases of larceny where the value of the property stolen does not exceed twenty dollars, the punishment shall, for the first offense, not exceed imprisonment in the state's prison or common jail, for a longer term than one year. If the larceny is from the person, or from the dwelling by breaking and entering in the daytime, this section shall have no application. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

1895, c. 285.

3472. Distinction between grand and petit, abolished. All distinctions between petit and grand larceny, where the same hath had the benefit of clergy, is abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is: Provided, that in cases of much aggravation, or of hardened offenders, the court

may, in its discretion, sentence the offender to the state's prison for a period not exceeding ten years.

Code, s. 1075; R. C., c. 34, s. 26.

XXI. LIQUORS.

3473. Adulteration of. If any person shall adulterate any spirituous, alcoholic, vinous or malt liquors by mixing the same with any substance of whatever kind, except as hereinafter provided, or if any person shall sell or offer to sell any spirituous, alcoholic, vinous or malt liquors, knowing the same to be thus adulterated, or shall import into this state any spirituous or intoxicating liquors, and sell or offer to sell such liquor, knowing the same to be adulterated, he shall be guilty of a misdemeanor and fined and imprisoned, or both, at the discretion of the court.

Code, s. 982; 1858-9, c. 57, ss. 1, 4.

3474. Manufacturing or selling poisonous. If any person shall manufacture, sell, or in any way deal out spirituous liquors, of any name or kind, to be used as a drink or beverage, and the same shall be found to contain any foreign properties or ingredients poisonous to the human system he shall be guilty of a felony and imprisoned in the state's prison not less than five years, and may be fined in the discretion of the court. It shall be competent for any citizen after making purchase of any spirituous liquors to cause the same to be analyzed by some known competent chemist, and if upon such analysis it shall be found to contain any foreign poisonous matter it shall be prima facie evidence against the party making such a sale.

Code, s. 983; 1873-4, c. 180, ss. 1, 2.

3475. Adulteration of, selling recipe for. If any person who shall sell or offer to sell any recipe or formula whatever for adulterating any spirituous or alcoholic liquors, by mixing the same with any substance of whatever kind, except as is hereinafter provided, he shall be guilty of a felony, and fined and imprisoned as is provided in the preceding section: Provided, that this section and the two preceding sections shall not be so construed as to prevent druggists, physicians, and persons engaged in the mechanical arts from adulterating liquors for medical and mechanical purposes.

Code, s. 984; 1858-9, c. 57, ss. 2, 3.

3476. Furnishing to inmates of institutions. If any person shall sell or give to any inmate of any charitable or penal institution any intoxicating drink, any narcotic or poison or poisonous substances, except upon the prescription of a physician, or shall give

or sell to any such inmate any deadly weapon, or any cartridge or ammunition for firearms of any kind, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned at the discretion of the court, and if an officer or employee of any institution of the state, be dismissed from his office.

1899, c. 1, s. 52.

3477. Political speaking, sale within two miles of. If any person shall sell or give away, either directly or indirectly, any spirituous liquors, wine or bitters containing alcohol, within two miles of any place at which political public speaking shall be advertised to take place, and does take place, during the day on which said speaking shall take place, he shall be guilty of a misdemeanor, and be fined not less than ten dollars nor more than twenty dollars, or imprisoned not exceeding twenty days.

Code, s. 1079; 1879, c. 212.

3478. Minors, selling to. If any dealer in intoxicating drinks or liquors sell, or in any manner part with for a compensation therefor, either directly or indirectly, or give away such drinks or liquors, to any unmarried person under the age of twenty-one years, knowing the said person to be under the age of twenty-one years, he shall be guilty of a misdemeanor; and such sale or giving away shall be prima facie evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit shall be considered a dealer within the meaning of this section.

Code, s. 1077; 1873-4, c. 68; 1881, c. 242.

3479. Minors, selling to; exemplary damages. The father, or if he be dead, the mother, guardian or employer of any minor to whom a sale or gift shall be made in violation of the preceding section, shall have a right of action in a civil suit against the person or persons so offending by such sale or gift, and upon proof of such illicit sale or gifts shall recover from such party or parties so offending, such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars.

Code, s. 1078; 1873-4, c. 68; 1881, c. 242, s. 2.

3480. Sunday, selling on. If any person shall sell spirituous, or malt, or other intoxicating liquors on Sunday, except on the prescription of a physician, and then only for medical purposes, he shall be guilty of a misdemeanor, and be punished by fine or imprisonment, or both, in the discretion of the court.

Code, s. 1117; 1876-7, c. 38.

3481. Local option territory, sale in. If any person shall sell any spirituous, vinous or malt liquors within any city, county, town

or township, in which a majority has voted for no license, he shall be guilty of a misdemeanor, and be fined or imprisoned, or both, at the discretion of the court.

Code, s. 3116; 1887, c. 215, s. 3.

3482. Local option territory, sale by druggist. If any druggist shall sell or otherwise dispose of any spirituous, vinous or malt liquors except for bona fide medical purposes and upon the prescription of a practicing physician, licensed by the state board of medical examiners, known to such druggist to be of reputable standing in his profession or recommended as such by a physician who is so known, which prescription shall be in writing signed by such physician, and shall specify the name of the person to be supplied and quantity or dose, or if any physician or other person shall give, procure or aid in procuring any false or fraudulent prescription for any spirituous, vinous or malt liquors in violation of the provisions of this section, he shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned at the discretion of the court. And no physician shall give a prescription to any drugstore in which he is financially interested, and nothing contained in this section shall be construed as authorizing any druggist to refill any prescription for intoxicating liquors.

Code, s. 3116; 1887, c. 215, s. 4; 1889, c. 375, s. 5.

3484. Manufacture of, outside of towns. If any person shall manufacture any spirituous, vinous or malt liquors, or intoxicating bitters, except in incorporated cities or towns wherein the manufacture of liquor is not now, or may not hereafter be prohibited by law, or regulated by special statute, he shall be guilty of a misdemeanor and be imprisoned not less than four months nor more than two years; upon a second conviction he shall be guilty of a felony and be imprisoned not less than one nor more than three years, and be fined not less than one hundred dollars nor more than one thousand dollars, or both. This section shall not be construed to prohibit the manufacture of wine or cider from grapes, fruit, or berries grown on the lands of the manufacturer or purchased by the manufacturer from the growers thereof, nor to brandy manufactured from fruit or grapes.

1903, c. 233, ss. 1, 4.

3485. Sale of, outside of towns. If any person, firm or corporation shall sell, or otherwise dispose of for gain, any spirituous, vinous or malt liquors, or intoxicating bitters, except in incorporated cities and towns, wherein the sale of liquor is not now or may not hereafter be prohibited by law, or regulated by special statute, he shall be guilty of a misdemeanor and upon conviction be fined not exceed-

ing two hundred dollars, or imprisoned not exceeding six months, or both. This section shall not apply to the sale of wine or cider manufactured from grapes, berries, or fruits grown upon the land of the person so manufacturing the same, or purchased by the manufacturer from the grower thereof, nor to brandy manufactured from fruits or grapes and sold in original packages of not less than five gallons, nor to sales of spirituous, vinous, or malt liquors by druggists upon the written prescription of a legally qualified physician having the purchaser under his charge.

1903, c. 233, ss. 1, 3.

3486. Sale in towns without license. If any person shall manufacture, sell or otherwise dispose of for gain any spirituous, vinous or malt liquors or intoxicating bitters, in any incorporated city or town, without first obtaining, as provided by law, a license therefor both from the board of commissioners of the county in which said town or city is situated, and from the board of aldermen or city councilmen, or the governing authorities, by whatever name called, of said city or town, he shall be guilty of a misdemeanor and be fined not more than two hundred dollars, or imprisoned not more than six months, or both. This section shall not apply to the sales of spirituous, vinous or malt liquors, or intoxicating bitters by druggists upon the written prescription of a legally qualified physician having the purchaser under his charge.

Code, s. 1076; 1903, c. 233, ss. 2, 3.

3487. Physicians and druggists. If any physician shall make any prescription, except in the case of sickness, for the purpose of aiding or abetting any person who is not bona fide under his charge, to purchase any intoxicating liquors contrary to law, or if any druggist shall duplicate the prescription of a physician for intoxicating liquors for any person not bona fide under his charge, without the written direction of the physician who gave the same, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined or imprisoned, or both, in the discretion of the court, for each and every offense.

1903, c. 233, s. 5.

3488. Druggists failing to keep record of sales. If any druggist shall fail to keep the record of sales of liquor, or shall refuse to permit examination of such record by the officers and other persons, as by law provided, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court.

1903, c. 233, s. 5.

3489. Dispensary officer or employee violating rules, etc. If any officer or employee of a dispensary established by law shall vio-

late any of the rules and regulations prescribed by the governing body of the city or town in which said dispensary is located, or by the dispensary commissioners, which said rules and regulations are hereby declared to be ordinances of said city or town, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned, or both, in the discretion of the court.

1903, c. 233, s. 17.

3490. Liquor selling in towns having dispensary. If any person shall, in any town in which a dispensary is established by law, sell or otherwise dispose of for gain any intoxicating liquors except as provided for sales in the dispensary, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court.

1903, c. 233, s. 15.

3491. Drinking on, or refusing to leave dispensary premises. If any person shall drink liquor on the premises on which any dispensary is located, or shall refuse or fail to leave said premises, after being ordered by the manager so to do, he shall be guilty of a misdemeanor and fined not more than fifty dollars, or imprisoned not more than thirty days.

1903, c. 233, s. 14.

3492. Manager of dispensary buying, without authority; adulterating; making false entry on books. If the manager or clerk of a dispensary shall procure any intoxicating liquors from any person other than those that the dispensary board shall direct, and offer the same for sale, or shall adulterate or cause to be adulterated, any intoxicating, spirituous, vinous or malt liquors, by mixing with coloring matter or any drug or ingredient whatever, or shall mix the same with water or with other liquor of different kind or quality, or shall make a false entry in any book or returns required by law, he shall be guilty of a misdemeanor.

1903, c. 233, s. 14.

3493. Wine, in what quantities, where drunk. If any person shall sell wine manufactured from fruit or grapes grown by himself, or bought from the growers thereof, in quantities less than one gallon, except to churches wishing to procure wine for communion services, or if any person shall drink or permit such wine to be drunk upon the premises where bought, he shall be guilty of a misdemeanor.

1903, c. 233, s. 6.

XXII. NATIONAL GUARD.

3494. Organizing company without authority. If any person shall organize a military company, or drill or parade under arms as a military body, except under the militia laws and regulations of the state, or shall exercise or attempt to exercise the power or authority of a military officer in this state, without holding a commission from the governor, he shall be guilty of a misdemeanor.

1893, c. 374, s. 38.

3495. Placing name on muster roll wrongfully. If any officer of the militia of the state shall knowingly or wilfully place, or cause to be placed, on any muster roll the name of any person not regularly or lawfully enlisted, or the name of any enlisted man who is dead or who has been discharged, transferred, or has lost membership for any cause whatsoever, or who has been convicted of any infamous crime, he shall be guilty of a misdemeanor.

1893, c. 374, s. 33.

3496. Injuring military property. If any person shall wantonly or wilfully injure or destroy any arms, equipment or other military property of the state, and refuse to make good such injury or loss, or shall sell, dispose of, secrete or remove the same with intent to sell or dispose thereof, he shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.

Code, s. 3274; 1876-7, c. 272, s. 19.

3497. Member of national guard failing to return property of state. If any member of the North Carolina national guard shall fail to return any property of the state or the United States to the armory or other place of deposit, when notified by competent authority so to do, he shall be guilty of a misdemeanor and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

3498. Refusing to deliver public arms to officer on demand. Every commissioned officer of the militia, whenever and wherever he shall see or learn that any of the arms or accoutrements or other military property belonging to the state is in the possession of any person other than in whose hands they may be placed for safe-keeping, under the provisions of the law, shall make immediate demand for the same personally or in writing; and should such person refuse to deliver them to the officer he shall be guilty in like manner, and punished in like manner, as for selling or embezzling public arms.

Code, s. 3558; R. C., c. 89, s. 10; 1831, c. 45, s. 7.

3499. Selling public arms. If any person to whom shall be confided public arms or accoutrements, shall sell, or in any manner

embezzle the same, or any part thereof, or if any person shall purchase any of them, knowing them to be such, the person so offending shall be guilty of a misdemeanor.

Code, s. 3556; R. C.; c. 89, s. 8; 1831, c. 45, s. 5.

3500. Selling accoutrements. If any person shall sell, dispose of, pawn or pledge, destroy or injure, or retain after demand made, any public property issued for the purpose of arming or equipping the militia of the state, he shall be guilty of a misdemeanor.

Code, s. 3274; 1893, c. 374, s. 30.

XXIII. NAVIGATION.

3501. Artificial islands, erecting. If any person shall erect artificial islands or lumps in any of the waters of the state east of the Wilmington and Weldon railroad and Petersburg and Weldon railroad, he shall be guilty of a misdemeanor.

Code, s. 986; 1883, c. 109.

3502. Boats, tackle, etc., removing. If any person shall take away from any landing or other place where the same shall be, or shall loose, unmoor, or turn adrift from the same, any boat, canoe, or pettiagua, oars, paddles, sails and tackle belonging to or in the lawful custody of any person; or if any person shall direct the same to be done without the consent of the owner, or the person having the custody or possession of such boat, canoe, or pettiagua, he shall forfeit and pay to such owner, or person having the custody and possession as aforesaid, the sum of two dollars, and shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court. And the owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any boat, canoe or pettiagua by public authority.

Code, s. 2288; 1889, c. 378; R. C., c. 14, ss. 1, 3.

3503. Buoys, carelessly dragging from position. If any person having charge of any raft passing any buoy, beacon or day mark, shall not exercise due diligence in keeping clear of it, or if unavoidably fouling it, shall not exercise due diligence in clearing it, without dragging from its position such buoy, beacon or day mark, he shall be guilty of a misdemeanor, and punished by fine not to exceed fifty dollars.

Code, s. 3087; 1883, c. 165, s. 3.

3504. Buoys, beacons, etc., interfering with. If any person shall moor any vessel of any kind or name whatsoever, or any raft

or any part of a raft, to any buoy, beacon or day mark, placed in the waters of North Carolina by the authority of the United States lighthouse board, or shall in any manner hang on with any vessel or raft, or part of a raft, to any such buoy, beacon or day mark, or shall wilfully remove, damage or destroy any such buoy, beacon or day mark, or shall cut down, remove, damage or destroy any beacon erected on land in this state by the authority of the said United States lighthouse board, or through unavoidable accident run down, drag from its position or in any way injure any buoy, beacon or day mark, as aforesaid, and shall fail to give notice as soon as practicable of having done so, to the lighthouse inspector of the district in which said buoy, beacon or day mark may be located, or to the collector of the port, or, if in charge of a pilot, to the collector of the port from which he comes, he shall for every such offense be guilty of a misdemeanor and punished by a fine not to exceed two hundred dollars or imprisoned not to exceed three months, or both, at the discretion of the court.

Code, s. 3085; 1858-9, c. 58, ss. 2, 3; 1883, c. 165, s. 1.

3505 Lighthouses, anchoring in range of. If the master of any vessel shall anchor on the range line of any range of lights established by the United States lighthouse board, unless such anchorage is unavoidable, he shall be guilty of a misdemeanor, and punished by a fine not to exceed fifty dollars.

Code, s. 3086; 1883, c. 165, s. 2.

3506. Lumbar men to remove obstructions in Albemarle sound. If any lumbar man shall fail to remove all obstructions placed by him in the waters of Albemarle sound and its tributaries, as soon as practicable, after they have ceased to use them for the purpose for which they were placed in said waters, from all places where the water is not less than two feet deep, and also, from all landing places on both sides, for the space of sixty feet from the shore outward, he shall be guilty of a misdemeanor, and fined not less than one dollar, nor more than fifty dollars, at the discretion of the court.

Code, s. 3303; 1880, c. 37, ss. 1, 2.

3507. Seamen, enticing from vessel. If any person shall induce any seaman, in the employment of any domestic or foreign vessel, in any of the ports of North Carolina, to leave any such vessel before his term of service shall have expired, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Code, s. 1108; 1879, c. 219, s. 1; 1881, c. 256, s. 1.

3508. Seamen, secreting or harboring. If any person shall secrete or harbor any seaman who has deserted from any domestic or foreign vessel, knowing that such seaman has deserted, he shall be guilty of a misdemeanor, and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and if such seaman be found concealed or secreted by any person on his premises, such concealment and secretion shall be deemed *prima facie* evidence that such person knew that such seaman was a deserter.

Code, s. 1109; 1879, c. 219, s. 2; 1881, c. 256, s. 2.

3509. Seamen, search warrants for. If any credible witness shall complain, upon oath before any justice of the peace, that any person has concealed on his premises any seaman who has deserted from any such domestic or foreign vessel, it shall be lawful for such justice to grant a search warrant to be executed within the limits of his county to any proper officer, authorizing him to search for such seaman, and to arrest the person on whose premises he may be found, and the person on whose premises such seaman shall be found shall be adjudged to pay the costs of such search warrant, if on examination it shall appear that such seaman was secreted or concealed by such person; otherwise the costs shall be paid by the party making the complaint.

Code, s. 1110; 1881, c. 256, s. 3.

3510. Seamen; appeal and procedure thereon. In all cases arising under the three preceding sections, if any appeal is prayed by either party at the time of the trial, it shall be granted; but no appeal shall be granted by any justice at any time after the final hearing of the case. In case an appeal is prayed at the trial, it shall be the duty of the justice to immediately proceed to reduce the testimony of any witness whose testimony is material to writing (if such witness shall be master, officer, or seaman on board of any vessel), in the presence of the adverse party, who may cross-question such witness, which testimony shall be subscribed by such witness and returned by the justice with the papers in the case; and on the hearing in the appellate court, the testimony so taken and reduced to writing by such justice shall be read, heard and accepted as the true and lawful testimony of such witness, as if such person were in person present to give evidence. For reducing such testimony to writing the justice shall receive the same fees as are allowed for taking depositions.

Code, s. 1111; 1881, c. 256, ss. 4, 5.

3511. Streams, obstructing. If any person shall wilfully fell any tree, or wilfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek or other natu-

ral passage for water, whereby the natural flow of water through such passage, is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. Nothing in this section shall prevent the erection of fishdams or hedges which do not extend across more than two-thirds of the width of any stream where erected, but if extending over more than two-thirds of the width of any stream, the said penalties shall attach.

Code, s. 1123; 1872-3, c. 107, ss. 1, 2.

3512. Streams navigable, obstructing; pilot failing to give information. If any person shall cast or throw from any vessel, into the navigable waters of Carteret or Onslow counties, of Tar or Pamlico river, or into the navigable waters of the Cape Fear, or any other river in the state, or into any channel of navigable water elsewhere than in a river, any ballast, stone, shells, earth, trash or other substance likely to be injurious to the navigation of such waters, rivers, or channel; or if any person shall wilfully pull down any beacon, stake or other mark, erected or placed by virtue of any by-law, order or regulation, passed or ordained by any commissioners of navigation, he shall be guilty of a misdemeanor and shall forfeit and pay two hundred dollars, to be recovered for the use of the commissioners in whose waters the offense was committed. If any pilot shall knowingly suffer any such unlawful act to be done, and shall not within ten days thereafter give to the said commissioners, or one of them, information thereof, such pilot shall likewise be guilty of a misdemeanor; and, besides the usual punishment of such offense, on conviction, shall be forever incapable of acting as a pilot in the state.

Code, ss. 3537, 3538; R. C., c. 85, ss. 40, 41; 1833, c. 146; 1784, c. 206, s. 11; R. S., c. 88, ss. 23, 24, 45; 1811, c. 839; 1842, c. 65, s. 4; 1846, c. 60, s. 3.

3513. Streams, obstructing passage of boats. If any person shall obstruct the free passage of boats along any river or creek, by felling trees, or by any other means whatever, he shall be guilty of a misdemeanor.

Code, s. 3711; R. C., c. 100, s. 6; 1796, c. 460, s. 2.

3514. Flats and barges removed from docks on order of harbor-master. The owner of any rafts, flats, vessels or other craft lying alongside of any wharf or wharves or before the entrance of any public docks, his or their agents or servants, shall, upon notice from the harbor-master, immediately remove the same, and upon his or their refusal so to do, it shall be the duty of the harbor-master,

and he is hereby authorized and directed, after notice as aforesaid to the owner or owners thereof, their agents or servants, forthwith to cause all such rafts, flats, vessels or other craft to be removed at the cost and expense of such owner or owners or their agent or agents, and the owner shall be guilty of a misdemeanor.

1903, c. 662, s. 3.

3515. Encumbering docks of Wilmington. Any person or persons encumbering either of the public docks of the city of Wilmington with logs, hulks, flats or barges, trash or garbage shall be guilty of a misdemeanor, and upon conviction thereof shall be fined ten dollars, and if not removed immediately upon notice from the harbor-master, shall be fined ten dollars for each and every day thereafter such nuisance shall remain.

1903, c. 662, s. 9.

3516. Obstructing harbor-master of Wilmington. Any person or persons who shall hinder, delay, obstruct or in any manner wilfully interfere with the harbor-master of Wilmington in the discharge of his duty shall be guilty of a misdemeanor, and be fined not more than fifty dollars or imprisoned not more than thirty days.

1903, c. 662, s. 8.

3517. Wrecks, commissioner of, violating law. If any commissioner of wrecks shall by fraud or wilful neglect violate any of the provisions of the chapter entitled Wrecks, or abuse the trust reposed in him, he shall forfeit and pay double the amount of damages to the party aggrieved, and shall be guilty of a misdemeanor, and upon conviction shall forfeit his office and shall thereafter be incapable of acting as commissioner.

1899, c. 79, s. 25.

3518. Failure to report finding wrecked property. If any person shall find any wrecked or stranded property on or near the seashore, and no person be present to claim the same, and such finder shall refuse to report such goods found he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars, or imprisoned not more than thirty days.

1899, c. 79, s. 24.

3519. Violating chapter on wrecks. If any person shall violate any of the provisions of the chapter entitled Wrecks, he shall be guilty of a misdemeanor.

1899, c. 79, s. 26.

3520. Obstructing waters of Currituck sound. It shall be unlawful for any person to impair or obstruct navigation in the

waters of Currituck sound and tributaries, and all persons, corporations, companies, or clubs, who have heretofore had placed or placed any hedging or hedgings across the mouth of any bay, creek, strait, or lead of water in Currituck sound or tributaries, made of iron, wire or wood or otherwise, for the purpose of preventing the free passage of boats or vessels of any size or class, or to stop the public use of any such bay, creek, strait or lead of water, are hereby required to forthwith remove the same. Any person, corporation, or club having violated or who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars nor less than ten dollars, or imprisoned not more than thirty days, at the discretion of the court.

1897, c. 277.

XXIV. OFFICERS.

3521. Acting without qualifying. If any officer shall enter on the duties of his office before he executes and delivers to the authority entitled to receive the same, the bonds required by law, and qualifies by taking and subscribing and filing in the proper office the oath of office prescribed, he shall be guilty of a misdemeanor.

Code, s. 79.

3522. Board of charities furnished information. If the board of commissioners of any county or the justices of the peace of any township, or any officer or employee of any charitable or penal institution of the state shall fail, refuse or neglect to furnish any information required by law to be furnished to the board of public charities of North Carolina, when they have been provided with the necessary blank forms for such reports, or shall fail upon request to afford proper facilities for the examination of any charitable or penal institution of the state, they shall be guilty of a misdemeanor.

Code, s. 2341; 1891, c. 491, s. 2; 1869-70, c. 154, s. 3.

3523. Bodies for dissection. If any person shall fail or refuse to perform any duty imposed upon him by the law providing for distribution of dead bodies for dissection in medical schools, he shall be guilty of a misdemeanor and fined not exceeding one hundred dollars.

1903, c. 666, s. 6.

3524. Bribery of. If any person holding office under the laws of this state who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the

express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be guilty of a felony, and punished by imprisonment in the state's prison for a term not exceeding five years, or fined not exceeding five thousand dollars, or both, in the discretion of the court.

Code, s. 991; 1868-9, c. 176, s. 2.

3525. Bribe, offering to. If any person shall offer a bribe, whether it be accepted or not, he shall be guilty of felony, and punished by imprisonment for a term not less than one year nor more than five years in the state's prison or county jail, in the discretion of the court.

Code, s. 992; 1870-1, c. 232.

3526. Bribery of legislator. If any person shall directly or indirectly promise, offer or give, or cause, or procure to be promised, offered or given, any money, goods, bribe, present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right of action, bribe, present or reward, or any other valuable thing whatever, to any member of the senate or house of representatives of this state after his election as such member, and either before or after he shall have qualified and taken his seat, with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending before the general assembly, or which may come before him for action in his capacity as a member of the general assembly, said person so offering, promising or giving, or causing or procuring to be promised, offered or given any such money, goods, bribe, present or reward, or any bond, contract, undertaking, obligation or security for the payment or delivery of any money, goods, bribe, present or reward, or other valuable thing whatever, and the member-elect who shall in anywise accept or receive the same or any part thereof shall be guilty of a felony, and fined not exceeding double the amount so offered, promised or given, and imprisoned in the state's prison not exceeding five years, and the person convicted of so accepting or receiving the same, or any part thereof, shall forfeit his seat in the general assembly and be forever disqualified to hold any office of honor, trust or profit under this state.

Code, s. 2852; 1868-9, c. 176 s. 5.

3527. Buying and selling offices. If any person shall bargain or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward, or other profit, directly or indirectly, or shall take any promise, covenant, bond or assurance for money, reward or profit, for an office or the deputation of an office, or any part thereof, which office or any part thereof shall touch

or concern the administration or execution of justice, or the receipt, collection, control, or disbursement of the public revenue, or shall concern or touch any clerkship in any court of record wherein justice is administered; or if any person shall give or pay money, reward or profit, or shall make any promise, agreement, bond or assurance for any of the said offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction thereof shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined, at the discretion of the court.

Code, s. 998; R. C., c. 34, s. 33; 5, 6 Edw. VI., c. 16, ss. 1, 5.

3528. Contracting for own benefit. If any person, appointed or elected a commissioner or director to discharge any trust wherein the state or any county, city, or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor.

Code, s. 1011; R. C., c. 34, s. 38; 1825, c. 1269; 1826, c. 29.

3529. County commissioner approving bond known to be insufficient. If any county commissioner shall approve any official bond which he knows or believes to be insufficient in the penal sum, or in the security thereof, he shall be guilty of a misdemeanor, and on conviction shall be removed from office and forever disqualified from holding or enjoying any office of honor, trust or profit under the state.

Code, s. 1880; 1869-70, c. 169, s. 7.

3530. County commissioners not heating jail. If any county commissioner shall fail to have the common jails so heated by furnaces, stoves, or otherwise, as to render them warm and comfortable, he shall, upon conviction, be punished by fine or imprisonment, or both, in the discretion of the court.

Code, s. 784; 1879, c. 25.

3531. Counties, cities, etc., speculation in claims against. If any clerk, sheriff, register of deeds, county treasurer, or other county, city, town or state officer shall engage in the purchasing of any county, city, town or state claim at a less price than its full and true value, or at any rate of discount thereon, or be interested in any speculation in any such claims, he shall be guilty of a misdemeanor,

and fined or imprisoned, and also shall be liable to removal from office at the discretion of the court.

Code, s. 1009; 1868-9, c. 260.

3532. Duty, failure to discharge. If any state or county officer shall fail, neglect or refuse to make, file or publish, any report, statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office as he is by law required to do, he shall be guilty of a misdemeanor.

3533. Treasurer of state, fraudulent entries and statements. If the treasurer of the state shall wittingly or falsely make, or cause to be made, any false entry or charge in any book kept by him as treasurer, or shall wittingly or falsely form, or procure to be formed, any statement of the treasury, to be by him laid before the governor, the general assembly, or any committee thereof, or to be by him used in any settlement which he is required to make with the auditor, with intent, in any of said instances, to defraud the state or any person, such treasurer shall be guilty of a misdemeanor, and fined, at the discretion of the court, not exceeding three thousand dollars, and imprisoned not exceeding three years.

Code, s. 1119; R. C., c. 34, s. 68.

3534. Public laws, custodians of, etc., disposing of or refusing to deliver to successor. It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the general assembly, supreme court reports, or other public documents are transmitted or deposited for the use of the county or the state, to safely keep the same in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and wilfully dispose of the same, by sale or otherwise; or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, at the discretion of the court.

Code, s. 1073; 1881, c. 151.

3535. Failure to file report of fines. If any officer who is by law required to file any report or statement of fines or penalties with the county board of education, shall fail so to do at or before the time fixed by law for the filing of such report, he shall be guilty of a misdemeanor.

1901. c. 4, s. 62.

3536. Neglect of duty by commissioner. If any county commissioner shall neglect to perform any duty required of him by law as a member of the board, he shall be guilty of a misdemeanor, and shall also be liable to a penalty of two hundred dollars for each offense, to be paid to any person who shall sue for the same.

Code, s. 711.

3537. Town officers failing to pay over taxes monthly. If any constable or collector of taxes for any town or city, or any other officer, shall fail to make settlement and full return of all moneys, penalties and fines coming into his hands each month with the town or city treasurer, or other officer authorized to receive the same, he shall be guilty of a misdemeanor.

Code, s. 3814; 1879, c. 194, s. 2; 1881, c. 37.

3538. Sheriff or other officer failing to return process. If any sheriff, constable, or other officer, whether state or municipal, or any person who shall presume to act as any such officer, not being by law authorized so to do, refuse or neglect to return any precept, notice, or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to any one who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor.

Code, s. 1112; R. C., c. 34, s. 118; 1818, c. 980, s. 3; 1827, c. 20, s. 4.

3539. Register of deeds failing to discharge duties. If any register of deeds fails to perform any of the duties imposed or authorized by law, he shall be guilty of a misdemeanor, and besides other punishments at the discretion of the court, he shall be removed from office.

Code, 3659; 1868, c. 35, s. 18.

3540. Register of deeds, failure to index instruments. If any register of deeds shall fail to provide and keep in his office full and complete alphabetical indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds and other instruments of writing required to be registered (said indexes to be kept in well-bound books, and shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed, so as to show the name of each party under the appropriate letter of the alphabet, and reference shall be made opposite each name to the page, title or number of the book in which is registered any such lien, deed, bond, conveyance or other instrument), or shall fail within twenty-four hours after registering any such instrument to index the same as above provided, he shall be guilty of a misdemeanor.

Code, s. 3664; 1899, c. 501; 1876-7, c. 93, s. 1.

3541. Swearing falsely to report. If any clerk, sheriff, register of deeds, county commissioner, county treasurer, justice of the peace, constable, or other county officer shall wilfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, state or school revenue, he shall be guilty of a misdemeanor.

Code, s. 731; 1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4.

3542. Officer, failure to discharge duties. If any clerk of any court of record, sheriff, justice of the peace, county commissioner, county surveyor, coroner, treasurer, constable or official of any of the state institutions, or of any town or city, shall wilfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. And if it shall be proved that such officer, after his qualification, shall have wilfully and corruptly omitted, neglected or refused to discharge any of the duties of his said office, or shall have wilfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense; and shall also be fined or imprisoned in the discretion of the court.

1901, c. 270, s. 2.

3543. Officer failing to discharge duties in regard to pensions. If any officer or other person shall neglect or refuse to discharge the duties imposed upon him by law in regard to pensions of Confederate soldiers, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court.

1889, c. 198, s. 15.

3544. Officer failing to pay over fines, penalties, etc. If any officer who receives or collects a fine, penalty or forfeiture in behalf of the state, or any tax imposed on licenses to retailers of wines, cordials, malt or spirituous liquors, and auctioneers, shall not, within thirty days after such reception or collection, pay over and account for the same to the treasurer of the county board of education for the benefit of the fund for common schools in such county, he shall be guilty of embezzlement, and may be punished not exceeding five years in the state's prison, and fined, at the discretion of the court.

Code, s. 3678; 1872-3, c. 144, sube. 6, ss. 6, 7; 1883, c. 136, s. 48.

3545. Sheriff failing to return *venire facias*. If any sheriff shall fail to duly execute and return any writ of *venire facias*, he shall be fined by the court not exceeding one hundred dollars.

Code, s. 1740; R. C., c. 35, s. 31; 1830, c. 27, s. 2.

3546. Insolvent taxpayers, failure to publish list of. If any sheriff or tax collector shall fail to publish a list of delinquent taxpayers in his county as required by law, he shall be guilty of a misdemeanor and fined not less than ten nor more than one hundred dollars.

Code, s. 2092; 1876-7, c. 78, ss. 1, 2, 3.

3547. Escape, officer indictable for, proof. If any person charged with a crime or sentenced by the court upon conviction of any offense, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any *capias* issuing on a bill of indictment, information, or other criminal proceeding, and such sheriff, deputy sheriff, coroner, constable or jailer, wilfully or negligently, shall suffer such person, so charged, or sentenced and committed, to escape out of his custody, the sheriff, deputy sheriff, coroner, constable or jailer so offending, being thereof convicted, shall be removed from office, and fined at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that such person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: Provided, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable, as if such conviction and removal had not been had.

Code, s. 1022; R. C., c. 34, s. 35; 1791, c. 343, s. 1.

3548. Habeas corpus; recommitting one discharged thereon. If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he shall be bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a misdemeanor.

Code, s. 1651; 1868-9, c. 116, s. 26.

3549. Habeas corpus; false return to writ. If any person shall make a false return to a writ of habeas corpus, he shall be guilty of a misdemeanor.

Code, s. 1653; 1868-9, c. 116, s. 28.

3550. Habeas corpus, concealing party entitled to. If any one having in his custody, or under his power, any party, who, by law, would be entitled to a writ of habeas corpus, or for whose relief such

writ shall have been issued, shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power of control, of another, or shall conceal or change the place of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a misdemeanor.

Code, s. 1654, 1655; 1868-9, c. 116, ss. 29, 30.

3551. Penalty for failing to make, or for refusing copy of, commitment. If any person, to whom a writ of habeas corpus is directed, shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay, or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainer, such person shall, upon conviction on indictment, be fined one thousand dollars, or imprisoned not exceeding twelve months, and if such person be an officer, shall moreover be removed from office.

Code, s. 1652; 1868-9, c. 116, s. 27.

3552. Homestead, failure to allot. If any officer making a levy under an execution shall refuse or neglect to summon and qualify appraisers to allot a homestead, or a personal property exemption when demanded, or shall unlawfully levy upon the homestead set apart by appraisers, or shall fail to make due return of his proceedings, he shall be guilty of a misdemeanor.

Code, s. 516; 1868-9, c. 137, s. 17.

3553. Homestead; officers, appraisers and debtor conspiring. Any officer, appraiser or assessor who shall wilfully or corruptly conspire with any judgment debtor or other appraiser or assessor to undervalue the homestead or personal property exemption of such debtor, or shall assign false metes and bounds, or make or procure to be made a false and fraudulent return thereof, shall be guilty of a misdemeanor.

Code, s. 517; 1868-9, c. 137, s. 18.

3554. Homestead; officers, appraisers and creditors conspiring. If any officer, appraiser or assessor shall wilfully or corruptly conspire with any judgment creditor, or other appraiser or assessor, to overvalue the homestead or personal property exemption of any debtor or applicant, or shall assign false metes and boundaries, or make, or procure to be made, false and fraudulent return thereof, he shall be guilty of a misdemeanor.

Code, s. 518; 1868-9, c. 137, s. 19.

Note. For civil liability, see Civil Procedure.

3555. Nonresident insane person, justice or clerk knowingly committing. If any clerk or justice of the peace shall knowingly

commit to any hospital a person who is not a bona fide citizen and resident of this state, he shall be guilty of a misdemeanor, and, upon conviction shall be fined or imprisoned, at the discretion of the court.
1899, c. 1, s. 18.

3556. Justice of the peace refusing to furnish bill of costs. If any justice of the peace before whom any trial is held shall refuse to furnish an itemized bill of costs, when demanded by the plaintiff or defendant, he shall be guilty of a misdemeanor, and upon conviction, shall be punished, at the discretion of the court.

Code, s. 734: 1887, c. 297.

3557. Justice of the peace acting after removal from township, or before qualifying. If any justice of the peace shall act as such after having removed out of his township and not returned for six months, unless re-elected or reappointed, or shall act as such without qualifying as required by law, he shall be guilty of a misdemeanor.

Code, s. 822.

3558. Ex-justice of the peace failing to turn over books and papers. If any justice of the peace, on expiration of his term of office, or if any personal representative of a deceased justice of the peace, shall, after demand upon him by the clerk of the superior court, wilfully fail and refuse to deliver to the clerk of the superior court all dockets, law and other books, and all official papers which came into his hands by virtue or color of his office, he shall be guilty of a misdemeanor.

Code, ss. 828, 829: 1885, c. 402.

3559. Officers ordering females to work in chain-gang. If any officer, either judicial, executive or ministerial, shall order or require the working of any female on the streets or roads in any group or chain-gang in this state, he shall be deemed guilty of a misdemeanor.

1897, c. 270.

3560. Sheriff or jailer failing to obey commitment from adjoining county. If any sheriff or jailer shall refuse to obey any order of commitment made by a justice of the peace or other proper officer of an adjoining county in which there is no jail, or an unfit or insecure jail, he shall be guilty of a misdemeanor.

Code, ss. 3457, 3458; R. C., c. 87, ss. 2, 3: 1835, c. 2, ss. 1, 2.

XXV. PERJURY.

3561. Perjury. If any person shall wilfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the state, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a misdemeanor and fined not exceeding one thousand dollars, and imprisoned in the county jail or state's prison not less than four months nor more than ten years.

Code, s. 1092; R. C., c. 34, s. 49; 1791, c. 338, s. 1.

3562. Subornation of. If any person shall, by any means, procure another person to commit such wilful and corrupt perjury as is mentioned in the preceding section, the person so offending shall be punished in like manner as the person committing the perjury.

Code, s. 1093; R. C., c. 34, s. 50; 1791, c. 338, s. 2.

3563. Court-martial. If any person shall wilfully and corruptly swear falsely before any court-martial, touching and concerning any matter or thing cognizable before such court-martial, he shall be liable to the pains and penalties of perjury.

Code, s. 3235; R. C., c. 70, s. 73; 1812, c. 828, s. 3.

3564. False oath to wrong a laborer. If any contractor, stevedore or boss stevedore shall make any false oath or false representation with intent to wrong, cheat or defraud any laborer as contemplated in the provisions and purview of the chapter entitled Liens, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished as is now prescribed by law for perjury.

1887, c. 145, s. 5.

3565. Before legislative committee. If any person shall wilfully and corruptly swear falsely to any fact material to the investigation of any matter before any committee of either house of the general assembly, he shall be subject to all the pains and penalties of wilful and corrupt perjury, and, on conviction in the superior court of Wake county, shall be confined in the state's prison for the time prescribed by law for perjury.

Code, s. 2857; 1869-70, c. 5, s. 4.

3566. Insolvent debtor. If any insolvent or imprisoned debtor take any oath prescribed in the chapter entitled Insolvent Debtors, falsely and corruptly, and upon indictment of perjury be convicted

thereof, he shall suffer all the pains of perjury, and he shall never after have any of the benefits of that chapter, but may be sued and imprisoned as though he had never been discharged.

Code, s. 2964; R. C., c. 59, s. 25; 1793, c. 100, s. 10; 1868-9, c. 162, s. 23.

3567. Trust for benefit of creditors; false oath. If any creditor of the maker of a deed of trust for the benefit of creditors shall knowingly swear falsely in the statement of the amount claimed by him required by law to be filed with the trustee, he shall be guilty of a misdemeanor.

1893, c. 453, ss. 6, 7.

Note. See Conveyances.

XXVI. PERSON.

3568. Abortion; destroying child; intent. If any person shall wilfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, he shall be guilty of a felony, and imprisoned in the state's prison for not less than one year nor more than ten years, and be fined at the discretion of the court.

Code, s. 975; 1881, c. 351, s. 1.

3569. Abortion; destroying woman; intent. If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and imprisoned in the jail or state's prison for not less than one year nor more than five years, and be fined, at the discretion of the court.

Code, s. 976; 1881, c. 351, s. 2.

3570. Assault, punishment for. In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays, shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape.

Code, s. 987; 1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6.

3571. Assault in secret manner. If any person shall maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, in a secret manner, with intent to kill such other person, he shall be guilty of a felony and punishable by imprisonment in jail or the penitentiary for not less than twelve months nor more than twenty years, or by a fine not exceeding two thousand dollars, or both, in the discretion of the court.

1887, c. 32.

3572. Assault, pointing gun. If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be fined, imprisoned, or both, at the discretion of the court.

1889, c. 527.

3573. Birth of child, concealing. If any person shall, by secretly burying or otherwise disposing of the dead body of a new-born child, endeavor to conceal the birth of such child, such person shall be guilty of a felony, and punished by fine or imprisonment, or both, such imprisonment to be in the county jail or state's prison, at the discretion of the court: Provided, that the imprisonment in the state's prison shall in no case exceed a term of ten years: Provided further, that nothing in this section shall be construed to prevent the mother, who may be guilty of the homicide of her child, from being prosecuted and punished for the same according to the principles of the common law. And any person aiding, counseling or abetting any woman in concealing the birth of her child, shall be guilty of a misdemeanor.

Code, s. 1004; R. C., c. 34, s. 28; 1818, c. 985; 1883, c. 390; 21 Jac. I., c. 27; 43 Geo. III., c. 58, s. 3; 9 Geo. IV., c. 31, s. 14.

3574. Carnal knowledge of married woman by personating husband. If any person shall have carnal knowledge of any married woman by fraud in personating her husband, he shall be guilty of a felony, and punished by imprisonment in the state's prison at hard labor not less than ten nor more than twenty years.

Code, s. 1103; 1881 c. 89, s. 1.

3575. Carnal knowledge of married woman, attempt. Every person convicted of an assault upon any married woman, with intent to have knowledge of her by fraud in personating her husband, shall be punished by imprisonment in the state's prison at hard labor not less than five nor more than fifteen years.

Code, s. 1104; 1881, c. 89, s. 2.

3576. Castration or maiming without malice aforethought. If any person shall, on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off a nose, lip or ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim, or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person; the person so offending shall be imprisoned in the county jail or state's prison not less than six months nor more than ten years, and fined, in the discretion of the court.

Code, s. 1000; R. C., c. 34, s. 47; 1754, c. 56; 1791, c. 339, ss. 2, 3; 1831, c. 40, s. 2.

3577. Castration with malice. If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim, or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall suffer imprisonment in the state's prison for not less than five nor more than sixty years.

Code, s. 999; R. C., c. 34, s. 4; 1831, c. 40, s. 1; 1868-9, c. 167, s. 6.

3578. Dueling; sending, accepting, bearing challenge. If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and, moreover, be ineligible to any office of trust, honor or profit in the state, any pardon or reprieve notwithstanding.

Code, s. 1012; R. C., c. 34, s. 48; 1802, c. 608, s. 1

3579. Duel, death in; murder. If any person fight a duel in consequence of a challenge sent or received, and either of the parties shall be killed, then the survivor, on conviction thereof, shall suffer death; and all their aiders or abettors shall be considered accessories before the fact.

Code, s. 1013; R. C., c. 34, s. 3; 1802, c. 608, s. 2.

3580. Homicide; murder in the first degree, second degree. A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state's prison.

1893, c. 85; 1893, c. 281.

3581. Homicide; manslaughter. If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or state's prison not less than four months nor more than twenty years.

Code, s. 1055; 1879, c. 255; R. C., c. 34, s. 24; 4 Hen. VII., c. 13; 1816, c. 918.

3582. Homicide; manslaughter, second offense. If any person, having been convicted of the crime of manslaughter and sentenced thereon, shall be convicted of a second crime of the like nature, he shall be imprisoned in the state's prison not less than five nor more than sixty years; and in every such case of conviction for such second offense, the prior conviction of the same person and sentence thereon may be shown to the court.

Code, s. 1056; R. C., c. 34, s. 25.

3583. Kidnapping. If any person shall forcibly or fraudulently kidnap any person, he shall be guilty of a felony, and upon conviction may be punished in the discretion of the court, not exceeding twenty years in the state's prison.

1901, c. 699, s. 1.

3584. Libel, communicating, to newspaper. If any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty of a misdemeanor.

1901, c. 557, ss. 2, 3.

Note. For punishment of libel by newspaper, see Libel and Slander, s. 1993.

3585. Maiming. If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offense, shall, for the first offense, be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, and be fined, in the discretion of the court; and for the second offense shall be imprisoned in the state's prison not less than five nor more than sixty years.

Code, s. 1080; R. C., c. 34, s. 14; 1754, c. 56; 1791, c. 339, s. 1; 1831, c. 12; 22 and 23 Car. II., c. 1, (coventry act).

3586. Rape. Every person who is convicted of ravishing and carnally knowing any female of the age of ten years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death.

Code, s. 1101; R. C., c. 34, s. 5; 18 Eliz., c. 7; 1868-9, c. 167, s. 2.

3587. Rape, assault with intent to commit. Every person convicted of an assault with intent to commit a rape upon the body of any female, shall be imprisoned in the state's prison not less than five nor more than fifteen years.

Code, s. 1102; 1868-9, c. 167, s. 3; R. C., c. 107, s. 44; 1823, c. 1229.

3588. Rape and buggery, proof. It shall not be necessary upon the trial of any indictment for the offenses of rape, carnally knowing and abusing any female child under ten years of age, and buggery, to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only.

Code, s. 1105; 1860-1, c. 30.

3589. Slander of innocent woman. If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor.

Code, s. 1113; 1879, c. 156.

3590. Enticing minors out of the state. If any person shall employ and carry beyond the limits of this state any minor, or shall induce any minor to go beyond the limits of this state for the purpose of employment without the consent in writing, duly authenticated, of the parent, guardian or other person having authority over such minor, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than five hundred and not more than one thousand dollars for each offense. The fact of the employment and going out of the state of the minor, or of the going out of the state by the minor, at the solicitation of the person for the purpose of employment, shall be prima facie evidence of knowledge that the person employed or solicited to go beyond the limits of the state is a minor.

1891, c. 45.

XXVII. PROFESSIONS.

3591. Clerks, justices, etc., practicing law. If any clerk of the superior or supreme court, or any deputy or assistant clerk of said courts, or any justice of the peace, or any county commissioner shall practice law in any of the state courts, he shall be guilty of a misdemeanor and fined not less than two hundred dollars.

Code, ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 406; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424.

3592. Dentistry, practicing, without license. If any person shall practice dentistry, except extracting teeth, without having first

passed the examination and obtained the certificate provided by law, he shall be guilty of a misdemeanor, and fined twenty-five dollars: Provided, any person so convicted shall not be entitled to sue for or recover any fee or charge for dental service in any court, and any sum of money paid to a person so convicted for dental services rendered may be recovered by the person so paying the same, or his legal representative: Provided further, no one applying for a license to practice dentistry shall be denied such license on account of race, color or previous condition of servitude.

Code, ss. 3154, 3156; 1879, c. 139, ss. 7, 9.

3593. Dentistry, falsely claiming to hold license. If any person shall knowingly and falsely claim or pretend to have or hold a certificate of proficiency granted by the board of examiners of the North Carolina Dental Society, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars nor less than twenty-five dollars for each offense.

1887, c. 178, s. 4.

3594. Embalming without license. If any person shall practice or hold himself out as practicing the art of embalming, without having complied with the provisions of the law as to license, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars for each offense.

1901, c. 338, s. 14.

3595. Medicine, practicing, without license. If any person shall practice medicine or surgery in this state for fee or reward, without first having obtained license from the board of examiners of the medical society of North Carolina, he shall not only not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or surgery, or any of the branches thereof, but shall also be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned, at the discretion of the court, for each and every offense: Provided, that this section shall not be construed to apply to women who pursue the avocation of a midwife: And provided further, that this section shall not apply to any reputable physician or surgeon resident in a neighboring state coming into this state for consultation with a registered physician resident herein. But this proviso shall not apply to physicians resident in a neighboring state regularly practicing in this state: Provided, that this section shall not apply to physicians who have a diploma from a regular medical college and were practicing medicine and surgery in this state prior

to the seventh day of March, one thousand eight hundred and eighty-five.

1885, c. 117, s. 2; 1885, c. 261; 1889, c. 181, ss. 1, 2.

3596. Medicine, practicing, without registering. If any person shall practice or attempt to practice medicine or surgery in this state without first having registered and obtained the certificate from the clerk of the superior court as required by law, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned at the discretion of the court, for each and every offense: Provided, this section shall not apply to women pursuing the avocation of midwife, nor to reputable physicians or surgeons resident in a neighboring state coming into this state for consultation with a registered physician of this state.

1889, c. 181, s. 5.

3597. Medicine, clerk of superior court registering doctor of, illegally. If any clerk of the superior court shall register, or issue a certificate to, any person practicing medicine or surgery in any other manner than that prescribed by law, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred dollars and shall be removed from office.

1889, c. 181, s. 6.

3598. Pharmacy; permitting clerk without license to compound prescriptions. If any person shall permit by wilful neglect the compounding and dispensing of prescriptions in his store or place of business by any person not licensed, except under the supervision of a licensed pharmacist, or if any person not licensed shall keep open shop for the retailing or dispensing of medicines or poisons, or shall fraudulently represent himself to be licensed, or if any pharmacist or any dealer in medicines shall fail to comply with the law in relation to retailing and dispensing of poisons, he shall for every such offense be guilty of a misdemeanor, and liable to a penalty not exceeding twenty-five dollars.

Code, s. 3145; 1897, c. 182, s. 7; 1881, c. 355, s. 11.

3599. Pharmacy, practicing, without displaying license. If any licentiate in pharmacy shall fail to display in some conspicuous place in his store, or place of business, his license, which shall be prima facie evidence of his having been duly licensed by the board of pharmacy, and if any licensed pharmacist failing to renew and display his license as required by law shall continue in the exercise of his profession, he shall be guilty of a misdemeanor.

1897, c. 182, s. 6.

3599a. Poisons; sale regulated. If any person shall retail any poison enumerated in schedules A and B of this section, without distinctly labelling the bottle, box, vessel or paper in which said poison is contained, with the name of the article, the word "poison," a vignette representing a skull and bones, and the name and place of business of the seller; or if any person shall sell or deliver any poison enumerated in said schedules A and B, unless upon due inquiry it be found that the purchaser is aware of its poisonous nature, and represents that it is to be used for a legitimate purpose; or if any person shall sell any poison included in schedule A without, before delivering the same to the purchaser, causing an entry to be made in a book kept for that purpose, stating the date of the sale, the name and address of the purchaser, the name and quantity of the poison sold, the purpose for which it is represented by the purchaser to be required, and the name of the dispenser, such book to be always open to proper authorities for inspection, he shall be guilty of a misdemeanor and be liable for all damages arising from such sale.

SCHEDULE A.

Arsenic and its preparations, corrosive sublimate, white precipitate, red precipitate, biniodide of mercury, cyanide of potassium, hydrocyanic acid, strychnine, and essential oil of bitter almonds.

SCHEDULE B.

Aconite, belladonna, colchicum, conium, nux vomica, henbane, savin, ergot, cotton root, cantharides, creosote, digitalis, and their pharmaceutical preparations, croton oil, chloroform, chloral hydrate, sulphate of zinc, carbolic acid, oxalic acid, opium and its preparations, except paregoric and other preparations of opium containing less than two grains to the ounce, and other deadly poisons. This section shall not apply to the dispensing of poison in usual doses and by physicians' prescriptions, nor to the sale of poisons by physicians in their actual practice, upon their own prescription; nor to the sale of such poisons by wholesale to pharmacists.

Code, ss. 3143, 3144; 1881, c. 355, ss. 9, 10.

3600. Trained nurse, acting as, illegally. Any person procuring license as a trained nurse by false representation, or who shall refuse to surrender a license which has been duly revoked in the manner prescribed by law, or who shall use the title "Registered Nurse" or "R. N." without first having obtained license to do so, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days.

1903, c. 359, s. 9.

XXVIII. PRISONERS AND CONVICTS.

3601. Breaking prison. If any person shall break prison, being lawfully confined therein, he shall be guilty of a misdemeanor.

Code, s. 1021; R. C., c. 34, s. 19; 1 Edw. II., st. 2d.

3602. Escape. If any prisoner, who shall be removed from the prison of the respective counties, cities and towns under the law providing for hiring prisoners, shall escape from the person or company having him in custody, he shall be guilty of a misdemeanor, and imprisoned at hard labor not more than thirty days, or fined not more than fifty dollars.

Code, s. 3455; 1876-7, c. 196, s. 4.

3603. Escape of, permitting, or maltreating. If any person charged in any way with the control or management of convicts, hired for service outside of the state's prison, shall negligently permit them to escape, or shall maltreat them, he shall be guilty of a misdemeanor; but this provision shall not be held to relieve any person from any criminal liability.

Code, s. 3450; 1881, c. 127, s. 2.

3604. In improper apartments. If the sheriff or jailer shall wantonly or unnecessarily confine those committed to his custody in any apartment, other than that provided and designated by law for persons of the description of the prisoner, he shall be guilty of a misdemeanor.

Code, s. 3471; R. C., c. 87, s. 16; 1795, c. 433, s. 4.

3605. Injury to, by jailer. If the keeper of a jail shall do, or cause to be done, any wrong or injury to the prisoners committed to his custody, contrary to law, he shall not only pay treble damages to the person injured, but shall be guilty of a misdemeanor.

Code, s. 3463; R. C., c. 87, s. 8; 1795, c. 433, s. 6.

3606. Messages and weapons, conveying to. If any person shall convey to or from any convict any letters or oral messages, or shall convey to him any weapon or instrument by which to effect an escape, or that will aid him in an assault or insurrection, or shall trade with a convict for his clothing or stolen goods, or shall sell to him any article forbidden him by prison rules, he shall be guilty of a misdemeanor: Provided, when murder, an assault or an escape is effected, with means furnished the convicts, the person convicted of furnishing the means shall be sentenced to not less than four years' hard labor in the state's prison.

Code, s. 3441; 1873-4, c. 158, s. 12.

XXIX. PROPERTY.

3607. Contractor failing to furnish owner indebtedness for labor and materials. If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor.

1887, c. 67, s. 4.

3608. Crop, tenant's, seized by landlord. If any landlord shall unlawfully, wilfully, knowingly and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor.

Code, s. 1759; 1876-7, c. 283, s. 6; 1883, c. 83.

3609. Crop, removal of, by tenant. If any lessee or cropper, or the assigns of either, or any other person, shall remove a crop, or any part thereof, from land without the consent of the lessor or his assigns, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, he shall be guilty of a misdemeanor.

Code, s. 1759; 1876-7, c. 283, s. 6; 1883, c. 83.

3610. Engines, boilers, machinery, tampering with. If any person shall wilfully turn out water from any boiler or turn the bolts of any engine or boiler, or meddle or tamper with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger, or delay to the owner in the prosecution of his work, he shall be guilty of a misdemeanor.

1901, c. 733.

3611. Fairs, injuring exhibits; indictment. If any person, without license of the owner, or any agricultural or other society, shall unlawfully carry away, remove, destroy, mar, deface or injure anything, animate or inanimate, while on exhibition on the grounds of any such society, or going to or returning from the same, he shall be guilty of a misdemeanor. It shall be sufficient in any indictment for any such offense, or for the larceny of any such thing, animate or inanimate as aforesaid, to charge that the thing so carried away, destroyed, marred, injured or feloniously stolen, is the property of the society to which the said thing shall be forwarded for exhibition.

Code, s. 2796; 1870-1, c. 184, s. 4.

Note. For fraudulent entries at fairs, see s. 3404.

3611a. Fair grounds, unlawful entering. If any person, after having been expelled from the fair grounds of any agricultural or horticultural society, shall offer to enter the same again without permission from such society; or if any person shall break over the enclosing structure of said fair grounds and enter the same, or shall enter the enclosure of said grounds by means of climbing over under or through the enclosing structures surrounding the same, or shall enter the enclosure through the gates without the permission of its gate-keeper or the proper officer of said fair association, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars, or imprisoned not more than thirty days.

Code, s. 2795; 1901, c. 291; 1870-1. c. 184, s. 3.

3612. Gas company; injuring machinery, fixtures, etc. If any person shall wilfully, wantonly or maliciously remove, obstruct, injure or destroy any part of the plant, machinery, fixtures, structures or buildings, or anything appertaining to the works of any gas company, or shall use, tamper or interfere with the same, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days for such offense, and such person shall also forfeit and pay to the company so injured, to be sued for and recovered in a civil action, double the amount of the damages sustained by any such injury.

1889 (Pr.), c. 35, s. 3.

3613. Electric and steam appliances protected. If any person shall wilfully, with intent to injure or defraud, commit any of the acts set forth in the following subsections, he shall be guilty of a misdemeanor:

1. Connect a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for the conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or instrument provided for registering the quantity consumed; or,

2. Obstruct, alter, injure or prevent the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person other than an employee of the company owning any gas or electric meter, who wilfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any such meter so detached or disconnected; or,

3. In any manner whatever change, extend or alter any service

or other pipe, wire or attachment of any kind, connecting or through which natural or artificial gas or electricity is furnished from the gas mains or pipes of any person, without first procuring from said person written permission to make such change, extension or alterations; or,

4. Make any connection or reconnection with the gas mains, service pipes or wires of any person, furnishing to consumers natural or artificial gas or electricity, or turns on or off or in any manner interferes with any valve or stop-cock or other appliances belonging to such person, and connected with its service or other pipes or wires, or enlarges the orifice of mixers, or uses natural gas for heating purposes except through mixers, or electricity for any purpose without first procuring from such person a written permit to turn on or off such stop-cock or valve, or to make such connection or reconnections, or to enlarge the orifice of mixers, or to use for heating purposes without mixers, or to interfere with the valves, stop-cocks, wires, or other appliances of such, as the case may be; or,

5. Retain possession of or refuse to deliver any mixer, meter, lamp, or other appliances which may be leased or rented to them by any person, for the purpose of furnishing gas, electricity or power through the same, or who sells, loans or in any manner disposes of the same to any person other than the said person entitled to the possession of the same; or,

6. Set on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person in conveying gas to consumers, or interferes in any manner with the wells, pipes, mains, gate-boxes, valves, stop-cocks, wires, cables, conduits or any other appliances, machinery or property of any person engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person; or,

7. Open or cause to be opened, or reconnect, or cause to be reconnected any valve lawfully closed or disconnected by a district steam corporation; or,

8. Turn on steam or cause it to be turned on, or re-enter any premises when the same has been lawfully stopped from entering such premises.

1901, c. 735.

3614. Forcible entry and detainer. No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor.

Code, s. 1028; R. C., c. 49, s. 1; 5 Ric. II., c. 8.

3615. Houses, churches, fences, walls, injuries to. If any person shall, by any other means than burning or attempting to burn, unlawfully and wilfully demolish, destroy, deface, injure, or damage any of the houses or buildings previously mentioned in this chapter; or shall unlawfully and wilfully burn, demolish, pull down, destroy, deface, damage, or injure any church, uninhabited house, outhouse, or other house or building not mentioned before in this chapter; or shall unlawfully and wilfully burn, destroy, pull down, injure, or remove any fence, wall, or other inclosure, or any part thereof surrounding or about any yard, garden, cultivated field or pasture, or about any church, graveyard, factory, or other house in which machinery is used, every person so offending shall be guilty of a misdemeanor.

Code, s. 1062; R. C., c. 34, s. 103.

3616. Landmarks, altering or removing. If any person shall wilfully or fraudulently remove, alter or deface any landmark, in anywise whatsoever, such person shall be guilty of a misdemeanor. This section shall not apply to such landmarks as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels.

Code, s. 1063; 1858-9, c. 17.

3617. Live stock, shipping, on Scuppernong river. If any transportation company or common carrier shall receive live stock for shipment at any of the landings or shipping points on Scuppernong river, Columbia excepted, between the hours of sunset and sunrise, or shall during the time any live stock may be held for shipment at any landing or shipping point on said river, Columbia excepted, fail to keep the same in a covered pound or inclosure, supplied with necessary food and drinking water, and at all times in full view of the public, such transportation company, common carrier, or the agent of either shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, at the discretion of the court.

1903, c. 283.

3618. Malicious injury to personal property. If any person shall wantonly and wilfully injure the personal property of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court.

Code, s. 1082; 1885, c. 53; 1876-7, c. 18.

3619. Malicious injury to real property. If any person shall maliciously commit any damage, injury or spoil upon any real prop-

erty whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person so offending shall be guilty of a misdemeanor: Provided, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing or the pursuit of game. When the owner, or one of the owners of an estate in possession, shall complain of the injury before a justice of the peace of the county in which the offense is charged to have been committed before the regular term of the superior court next after the commission of the offense, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offense, shall not exceed a fine of fifty dollars or imprisonment for thirty days.

Code, s. 1081; R. C., c. 34, s. 111; 1873-4, c. 176, s. 5.

3620. Milldams, injuries to. If any person shall cut away, destroy, or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal, or water channel erected, opened, used, or constructed for the purpose of furnishing water for the operations of any mill, factory or machine works, or for the escape of water therefrom, he shall, upon conviction, be fined or imprisoned, or both, at the discretion of the court.

Code, s. 1087; 1866, c. 48.

3621. Mills, false toll-dishes. If any owner, by himself or servant, keeping any mill, shall keep any false toll-dishes, he shall be guilty of a misdemeanor.

Code, s. 1848; R. C., c. 71, s. 7; 1777, c. 122, s. 11.

3622. Monuments and tombstones, defacing or removing. If any person shall, unlawfully and on purpose, remove from its place any monument of marble, stone, brass, wood or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age or death of any person, whether situated in or out of the common burying ground, or shall unlawfully or on purpose break or deface such monument, or alter the letters, marks or inscription thereof, he shall be guilty of a misdemeanor.

Code, s. 1088; R. C., c. 34, s. 102; 1840, c. 6.

3623. Moving enclosures of graveyards. If any person shall unlawfully take away any stone, brick, iron or anything that encloses private graveyards, he shall be guilty of a misdemeanor, and on

conviction, shall be fined not more than ten dollars or imprisoned not more than thirty days.

1889, c. 130.

3624. Graves, disturbing. If any person shall, without due process of law, or the consent of the surviving husband or wife, or the next of kin of the deceased, and of the person having the control of such grave, open any grave for the purpose of taking therefrom any such dead body, or any part thereof buried therein, or anything interred therewith, he shall be guilty of a felony, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court.

1885, c. 90.

3625. Surveyor's chain tested. If any person who shall use any chain for measuring land without having the same first measured and sealed by the standard-keeper, or who shall use the same for a longer period than two years without bringing it to the standard-keeper and having the same measured and sealed by him, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars.

1889, c. 409, s. 2.

3626. Possession, surrendering, to other than landlord. Any tenant or lessee of lands who shall wilfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a misdemeanor.

Code, s. 1760; 1883, c. 138.

3627. Taking unlawful possession of another's house. If any person shall enter upon the lands of another and take possession of any house or building being thereon, without permission of the owner or agent and without a bona fide claim of right or title so to enter and take possession, and shall fail or refuse to vacate said premises within ten days after being notified personally in writing to quit said premises, he shall be guilty of a misdemeanor and fined or imprisoned at the discretion of the court.

1893, c. 347.

3628. Tenant injuring houses, fences, trees, etc. If any tenant shall, during his term or after its expiration, wilfully and unlawfully demolish, destroy, deface, injure or damage any tenement house, uninhabited house or other outhouse, belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and wilfully burn,

destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall wilfully and unlawfully cut down or destroy any timber, fruit, shade or ornamental tree belonging to said landlord, he shall be guilty of a misdemeanor.

Code, s. 1761; 1883, c. 224.

3629. Timber, cutting or removing, from land of another. If any person, not being the bona fide owner thereof, shall knowingly and wilfully cut down, injure or remove any standing, growing, or fallen tree, or log, the property of another, he shall be guilty of a misdemeanor and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days.

1889, c. 168.

3630. Trespass on land after being forbidden; license to look for estrays. If any person, after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: Provided, that if any person shall make a written affidavit before a justice of the peace of the county that any of his cattle or other live stock (which shall be specially described and set forth in such affidavit) have strayed away, and he has good reason to believe that they are on the lands of another person, then such justice may, in his discretion, allow such person to enter on said premises with one or more servants, without firearms, in the day time (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to said justice shall appear reasonable; but the only effect of such license shall be to protect the persons entering from indictment therefor, and then only, provided the license shall have been made bona fide, and without any damage except such as were necessary to conduct the search.

Code, s. 1120; 1866, c. 60.

3631. Trustee in deed of trust for creditors violating duty. If any trustee in a deed of trust for the benefit of creditors shall fail to file his inventory as required by law, or shall knowingly make any false statement in such inventory, or shall knowingly fail to include any property therein, or shall sell any part of the property described in the deed of trust within ten days unless such property so sold be perishable, or shall fail to file either of the quarterly accounts or the final accounts as required by law, or shall knowingly make any false statement in such quarterly or final account, or shall knowingly fail to include any property, money or disbursement in such quar-

terly or final account, he shall, in either case, be guilty of a misdemeanor.

1893, c. 453, s. 8.

Note. See Conveyances, subchapter Deeds of Trust for Creditors.

3632. Cheating minors. Whenever any person having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound shall hire and employ any minor to assist in said work upon the faith of and by color of said contract and with intent to cheat and defraud said minor, and shall secure the contract price and shall wilfully fail to pay said minor when he shall have performed his part of said contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1893, c. 309.

3633. Removing dog-tongue, etc., in certain counties. If any person shall enter upon and remove from the lands of any other person, without first obtaining permission from the landowner, any dog-tongue (or vanilla), whortleberries or other fruits, or any other marketable product of the soil, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days: Provided, that this section shall only apply to the counties of Sampson and Duplin.

1889, c. 77.

XXX. PUBLIC JUSTICE.

3634. Corporations, agents of, refusing certain demands by officer with execution for service. If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, wilfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall wilfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall wilfully refuse to deliver to such officer any evidences of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor.

1901, c. 2, ss. 67, 68, 70.

3635. Corporation commission, witnesses before. If any person duly summoned to appear and testify before the corporation commission shall fail or refuse to testify without lawful excuse or shall refuse to answer any proper question propounded to him by said commission in the discharge of duty or shall conduct himself in a rude, disrespectful or disorderly manner before said commission, or any of them deliberating in the discharge of duty, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than fifty nor more than one thousand dollars.

1899, c. 164, s. 10.

3636. General assembly, failure to attend as witness before committee of. If any person shall wilfully fail or refuse to attend or produce papers, on summons of any committee of investigation of either house of the general assembly, either select or committee of the whole, he shall be guilty of a misdemeanor, and on conviction in the superior court of the county in which such witness may reside or be found, he shall be fined not less than five hundred dollars nor more than one thousand dollars, and imprisoned, at the discretion of the court.

Code, s. 2854; 1869-70, c. 5, s. 2.

3637. Internal improvements, witnesses before board. If any person shall refuse to obey any summons of, or answer any questions when required so to do by, the board of internal improvements, when the board is making an investigation as authorized by law, he shall be guilty of a misdemeanor.

Code, s. 1721; 1879, c. 281, s. 3.

3638. Insane person, aiding to escape from hospital. If any person shall assist any inmate of a state hospital to escape therefrom, he shall be guilty of a misdemeanor.

1899, c. 1, s. 53.

3639. Insane; violation of ordinance of hospital. If any person shall violate any ordinance adopted by the board of directors of any state hospital for the insane, or of the North Carolina school for the deaf and dumb, or the deaf, dumb and blind, he shall be guilty of a misdemeanor, and upon conviction, shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1899, c. 1, s. 54; 1901, c. 627.

3640. Jurors and witnesses, intimidating. If any person shall by threats, menaces, or in any other manner, intimidate or attempt to intimidate any person who is summoned or acting as a juror or witness in any of the courts of this state, or prevent or deter, or attempt

to prevent or deter any person summoned or acting as such juror or witness from attendance upon such court, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court.

1891, c. 87.

3641. Jurors, bribery of. If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a state prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be guilty of a felony, and imprisoned in the state's prison or county jail not less than four months nor more than ten years.

Code, s. 990; R. C., c. 34, s. 34; 5 Edw. III., c. 10; 34 Edw. III., c. 8; 38 Edw. III., c. 12.

3642. Lynching. If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoners, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the state's prison or the county jail, not less than two nor more than fifteen years.

1893, c. 461, s. 1.

3643. Lynching; witness refusing to appear and testify. If any person be summoned as a witness in the investigation of a charge of lynching shall wilfully fail to attend as a witness in obedience to the process served on him, or if, after being sworn, he refuse to answer questions pertinent to the matter being investigated before any tribunal, he shall be guilty of a misdemeanor, and, on conviction, shall be fined or imprisoned, or both, at the discretion of the court.

1893, c. 461, s. 3.

3644. Officers, resisting. If any person shall wilfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor.

1889, c. 51, s. 1.

3645. Officer, refusing to aid, in arrest. If any person, after having been lawfully commanded to aid an officer in arresting any

person, or in retaking any person who has escaped from legal custody, or in executing any legal process, wilfully neglects or refuses to aid such officers, he shall be guilty of a misdemeanor.

1889, c. 51, s. 2.

3646. Town ordinance, violation of. If any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Code, s. 3820; 1871-2. c. 195, s. 2.

XXXI. PUBLIC PEACE.

3647. Armed men in bodies as detectives. If any body of men composed of more than three persons calling themselves detectives or claiming to be in the employ of any detective agency or known and designated as detectives shall go armed they shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court.

1893, c. 191.

3648. Disturbing certain meetings. If any person shall wilfully interrupt or disturb any picnic, excursion party, school entertainment, political meeting, or any meeting or other organization whatsoever lawfully and peaceably held, either at, within or without the place where such picnic, excursion party, school entertainments, political meetings or any meetings or other organization is held, he shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court.

1897, c. 213.

3649. Disturbing religious assembly by certain exhibitions. If any person shall bring within half a mile of any place of where the people are assembled for divine worship, and stop for exhibition any stud-horse or jack, or shall bring within that distance any natural or artificial curiosities, and there exhibit them, he shall forfeit and pay to any one who will sue therefor the sum of twenty dollars and shall also be guilty of a misdemeanor: Provided, that nothing herein shall be construed to prohibit such exhibitions at any time, if made within the limits of any incorporated town, or without such limits, if made before the hour of ten o'clock in the forenoon, or after three o'clock in the afternoon.

Code, s. 3670; R. C., c. 97, s. 6; 1809, c. 779, s. 1.

3650. Disturbing religious congregation. If any person shall be intoxicated or shall be guilty of any rude and disorderly conduct at

any place where people are accustomed to meet for divine worship, and while the people are there assembled for such worship, whether such worship should have begun or not, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned in the discretion of the court.

1901, c. 738.

3651. Prize-fighting, engaging in, betting on, aiding and abetting. If any two or more persons engage in a prize fight, or sparring match, or glove or fist contest, for money or other valuable prize or stake; or if any person bet or lay a wager on the result thereof; or advise, aid or abet in any way whatever in promoting the same, he shall be fined not less than five hundred dollars, or imprisoned in the state's prison or jail for not less than one year nor more than five years, or both, in the discretion of the court.

1895, c. 28, ss. 1, 2, 3, 4.

3652. Prize fight, duty of governor to prevent. It shall be the duty of the governor, if he be apprised by the affidavits of two responsible citizens of the state that there is imminent danger that a prize fight is about to occur, to use, as far as necessary, the civil and military power of the state to prevent it, and to have the offenders arrested and bound to keep the peace.

1895, c. 28, s. 5.

3653. Weapons, carrying concealed. If any one, except when on his own premises, shall carry concealed about his person any pistol, bowie-knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles or razor or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court. And if any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be prima facie evidence of the concealment thereof. This section shall not apply to the following persons: Officers and soldiers of the United States army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties.

Code, s. 1005.

Note. Hampton's Detective Bureau exempt in Buncombe county.

XXXII. PUBLIC POLICE.

3654. Advertisements, injury to. If any person shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, unless immoral or obscene, whether put up by an officer of the law in performance of the duties of his office, or other person for a lawful purpose, before the object for which such notice, sign or advertisement shall have been posted shall have been accomplished, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding twenty-five dollars or imprisoned not exceeding thirty days at the discretion of the court. Nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put up on his own land or lands of which he may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office.

1885, c. 302.

3655. Advertisements, defacing. If any person shall wilfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacing, tearing down, removing or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Code, s. 981; 1876-7, c. 215.

3656. Bills, etc., unauthorized, issued to circulate as money. If any person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate of deposit, promissory note or obligation, or any other kind of security, whatever may be its form or name, with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, he shall forfeit and pay for each offense, the sum of fifty dollars; and if the party offending be a corporation, it shall also forfeit its charter. And every person offending against this section, or aiding or assisting therein, shall be guilty of a misdemeanor.

Code, s. 2493; 1895, c. 127; R. C., c. 36. s. 5.

3657. Bills, etc., unauthorized, passing as money. If any person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any such bill, check, certificate, promissory note, or other security of the kind mentioned in preceed-

ing section, whether the same were issued within or without the state, such person or corporation, and the officers and agents of such corporation aiding therein, who shall offend against this section, shall for every such offense forfeit and pay five dollars, and shall be guilty of a misdemeanor.

Code, s. 2494; 1895, c. 127; R. C., c. 36, s. 6.

3659. Ginseng, digging between April and September. If any person dig ginseng, except on his own premises, between the first day of April and the first day of September, he shall forfeit and pay the sum of ten dollars for each day or part of a day's digging, and shall also be guilty of a misdemeanor.

Code, s. 1053; 1866-7, c. 60.

3660. Gambling. If any person play at any game of chance at which money, property or other thing of value is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor.

1891, c. 29.

3661. Gambling, allowing, in house where liquor sold; duty of police officers; penalty. If any keeper of an ordinary, or house of entertainment, or of a house wherein liquors are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be played in any such house, or in any part of the premises occupied therewith; or shall furnish persons so playing or betting either on said premises or elsewhere with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and fined not less than five hundred dollars, and be imprisoned not less than six months. Any person who shall be convicted under this section shall, upon such conviction, forfeit his license to do any of the businesses mentioned in this section, and shall be forever debarred from doing any of the said businesses in this state, and the court shall embody in its judgment that such person has forfeited his said license, and no board of county commissioners, board of town commissioners or board of aldermen shall hereafter have power or authority to grant to such convicted person or his agent a license to do any of the businesses mentioned herein. It shall be the duty of every police officer of the cities, towns and villages of this state to make diligent inquiry and to exercise constant watchfulness to discover whether any of the offenses enumerated in said section are being committed, and to report once a week under oath to the mayor or other chief officer of his city, town or village, whether such offenses are being committed, and all the facts within his knowledge, or of which he has information relating

thereto, and if any such police officer shall know or have information that such offenses are being committed and shall fail or neglect to report the same to such mayor or chief officer, together with all the information known to him, as to the person or persons committing the same, the time and place of the commission and the names of the witnesses thereto, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court and shall forfeit his office. And it shall be the duty of such mayor or chief officer to require the said report herein provided for, and to require that the same shall be verified by the oath of such policeman, and if it appear upon such reports that any of the said offenses have been committed, it shall be the duty of such mayor or chief officer to issue his warrant for the arrest of the offender. Any such mayor or chief officer of any of the said cities, towns, or villages who shall fail or neglect to require the reports herein mentioned, or shall fail or neglect to require of such police officer to verify the same upon oath, or who shall refuse or neglect upon its appearing from such reports that there is probable cause to believe that any of the said offenses have been committed to issue his warrant for the arrest of the offender, shall be guilty of a misdemeanor. Any person committing any of the offenses mentioned in this section shall be liable to a penalty of five hundred dollars, to be recovered by suit in the superior court in the county in which such offense may have been committed, one-half thereof to the use of the person bringing said suit, and one-half to the school fund of the county.

Code, s. 1043; 1901, c. 753; R. C., 34, s. 76; 1799, c. 526; 1801, c. 581; 1831, c. 26.

3662. Gambling, faro-banks and tables. If any person shall open, establish, use, or keep a faro-bank or a faro-table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property, or thing of value, whether the same be in stake or not, he shall be guilty of a misdemeanor, and fined at least two hundred dollars and imprisoned not less than three months.

Code, s. 1044; R. C., c. 34, s. 71; 1848, c. 34; 1856-7, c. 25.

3663. Gaming tables, betting thereat. If any person shall establish, use or keep any gaming table (other than a faro-bank) by whatever name such table may be called, at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars, and be imprisoned not less than thirty days; and every person who shall play thereat or thereat bet any money, property or thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and fined not less than ten dollars.

Code, s. 1045; R. C., c. 34, s. 72; 1791, c. 336; 1798, c. 502, s. 2.

3664. Gaming tables, allowing on premises. If any person shall knowingly suffer to be opened, kept or used in his house or any part of the premises occupied therewith, any of the gaming tables by this chapter prohibited, he shall forfeit and pay to any one who will sue therefor two hundred dollars, and shall also be guilty of a misdemeanor and fined and imprisoned.

Code, s. 1046; R. C., c. 34, s. 73; 1798, c. 502, s. 3; 1800, c. 5, s. 2.

3665. Gaming tables destroyed by justices. All justices of the peace, sheriffs, constables, and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by this chapter is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect their destruction.

Code, s. 1049; R. C., c. 34, s. 74; 1791, c. 336; 1798, c. 502, s. 2.

3666. Gambling; justices and other officers to summon witnesses. All justices of the peace, intendants and magistrates of police, mayors or towns, and judges of the supreme or superior court, who shall have good reason to believe that any person within their jurisdiction has knowledge of the existence and establishment of any faro-bank or faro-table, or gaming tables, prohibited by this chapter, or place where intoxicating liquors are sold contrary to law, in any town or county within their several jurisdictions, and such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, intendant and magistrate of police, mayor of town, or judge of supreme or superior court, to issue to the sheriff of the county, or any constable of the town or township in which said faro-bank or faro-table, or gaming table or tables, or place where intoxicating liquors are sold contrary to law, are supposed to be, a subpoena, *capias ad testificandum*, or summons in writing, commanding such person to appear immediately before said justice of the peace, intendant or magistrate of police, mayor or judge, and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of said gaming table or tables, faro-bank or faro-table, and the names and personal description of the keepers thereof; and such evidence when obtained shall be considered and held in law as an information on oath, and said justice, intendant, magistrate, mayor or judge, may thereupon proceed to seize and arrest said keepers and destroy said tables, or issue process therefor, in like manner as they do by authority of the preceding section.

Code, s. 1050; 1858-9, c. 34, s. 1; 1889, c. 355.

3667. Gambling, money to be seized. All moneys, or other property or thing of value exhibited for the purpose of alluring persons to bet on any game, shall be liable to be seized by any justice of the peace, or by any person acting under his warrant. And the moneys or other property or thing which shall be so seized, shall belong one-half to the person seizing them, and the other half to the use of the poor.

Code, s. 1051; R. C., c. 34, s. 77; 1798, c. 502, s. 3.

3668. Gaming tables, opposing destruction of. If any person shall oppose the destruction of any prohibited gaming table, or the seizure of any moneys, property, or other thing staked on, forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars, for the use of the state and the person so opposed; and shall, moreover, be guilty of a misdemeanor.

Code, s. 1052; R. C., c. 34, s. 78; 1798, c. 502, s. 4.

3669. Lotteries, advertising. If any one by writing or printing or by circular or letter or in any other way advertise or publish an account of a lottery, whether within or without this state, stating how, when or where the same is to be or has been drawn or what are the prizes therein or any of them or the price of a ticket or any share or interest therein or where or how it may be obtained, he is guilty of a misdemeanor.

1887, c. 211.

3670. Lotteries. If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person, by such way and means, expose or set to sale any house or houses, real estate, or any goods or chattels, cash, or written evidence of debt, or certificates of claims, or anything of value whatsoever, every person so offending shall be guilty of a misdemeanor, and be fined not exceeding two thousand dollars, or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, money or evidences of debt, or in any manner distributes gifts or prizes upon tickets or certificates sold for that purpose, shall be held liable to prosecution under this section.

Code, s. 1047; R. C., c. 34, s. 69; 1834, c. 19, s. 1; 1874-5, c. 96.

3671. Lottery tickets, sale of. If any person shall sell, barter or dispose of any lottery ticket or order, for any number or shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the state for or on behalf of any such lottery, to be

drawn or paid either out of or within the state, such person shall be guilty of a misdemeanor, and punished as in the preceding section.

Code, s. 1048; R. C., c. 34, s. 70; 1834, c. 19, s. 2.

3672. Letters, wrongfully opening or reading. If any person shall wilfully, and without authority, open or read, or cause to be opened or read, a sealed letter or telegram, or shall publish the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, he shall be guilty of a misdemeanor.

1889, c. 41, s. 2.

3673. Nontransferable scrip to laborers. If any person who employs laborers by the day, week or month shall issue in payment for such labor any ticket or tickets, certificate or other scrip bearing upon their face the words "nontransferable," or shall issue tickets, certificates or scrip in any form that would render them void by transfer from the person to whom issued; or shall refuse to pay to the person holding the same their face value, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days.

1889, c. 280; 1891, c. 78; 1891, c. 456; 1891, c. 46; 1891, cc. 167, 370; 1895, c. 127; 1891, cc. 167, 456.

3674. Obscene literature. If any person shall exhibit for the purpose of gain, lend for hire or otherwise publish or sell for the purpose of gain, or exhibit in any school, college or other institution of learning, or have in his possession for the purpose of sale or distribution, any obscene book, paper, writing, print, drawing or other representation, he shall be guilty of a misdemeanor.

1885, c. 125.

3675. Pension claims, speculating in. If any person shall speculate in or purchase for a less sum than that to which each may be entitled the claims of any soldier or sailor, or widow of a deceased soldier or sailor, allowed under the provisions of the pension law, he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

1903, c. 273, s. 12; 1885, c. 214, s. 12.

3676. Public drunkenness. If any person shall be found drunk or intoxicated on the public highway, or at any public place, or meeting, in the counties of Dare, Graham, Buncombe, Henderson, Jackson, Ashe, Stanly, Madison, Gaston, Cleveland, Haywood, Macon, Mecklenburg, or Rutherford, or in Poplar Branch and Fruitville townships, Currituck county, or at Pungo in Beaufort county,

he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

1897, c. 57; 1899, cc. 87, 208, 608, 638; 1901, c. 445; 1903, c. 116; 1903, c. 758; 1903, c. 124; 1903, c. 523.

3677. Tramps, who are; discharged, how. If any person shall go about from place to place begging, or subsisting on charity, he shall be denominated a tramp, and punished by a fine not exceeding fifty dollars, or by imprisonment not to exceed thirty days: Provided, that any person who shall furnish satisfactory evidence of good character shall be discharged without cost. Any act of begging or vagrancy by any person, unless a well-known object of charity, shall be evidence that the person committing the same is a tramp. This section shall not apply to any woman; or minor under the age of fourteen years; nor to any blind person.

Code, ss. 3828, 3829, 3831, 3833; 1897, c. 268; 1879, c. 198, ss. 1, 4, 6.

3678. Tramp entering dwelling without consent. If any tramp shall enter any dwelling-house or kindle any fire on the highway or on the land of another without the consent of the owner or occupant thereof, or shall be found carrying any firearms or other dangerous weapon, or shall threaten to do any injury to any person, or to the real or personal estate of another, he shall be punished by imprisonment at the discretion of the court, not to exceed twelve months.

Code, s. 3829; 1879, c. 198, s. 2.

3679. Tramp maliciously injuring person or property. If any tramp shall wilfully and maliciously do any injury to any person or to the real or personal estate of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed three years.

Code, s. 3830; 1879, c. 198, s. 3.

3680. Tramp, arrest of. Any person, upon a view of any offense described in sections three thousand six hundred and seventy-seven, three thousand six hundred and seventy-eight, three thousand six hundred and seventy-nine and three thousand six hundred and eighty-one shall cause the said offender to be arrested upon a warrant and taken before some justice of the peace, or may apprehend the offender and take him before a justice of the peace, for examination, and, on his conviction, shall be entitled to the same fee as a sheriff.

Code, s. 3832; 1879, c. 198, s. 5.

3681. Vagrancy. If any person who may be able to labor and who has no apparent means of subsistence, shall neglect to apply himself to some honest occupation for the support of himself and

his family; or, if any person shall be found spending his time in dissipation, or gaming, or sauntering about without employment, or endeavoring to maintain himself or his family by any undue or unlawful means, he shall be denominated a vagrant, and be guilty of a misdemeanor, and punished by a fine not to exceed fifty dollars or by imprisonment not to exceed thirty days; and the offense shall be cognizable before a justice of the peace, who may release the party on his giving a recognizance, with or without security, for his industrious and peaceable deportment for one year or less from the date thereof, or may also impose on him a punishment not to exceed that above mentioned.

Code, s. 3834; R. C., c. 34, s. 43; 1840, c. 61; 1866, c. 42; 1873-4, c. 176, s. 12; 1879, c. 198.

Note. This section is changed as far as it concerns the counties of Pitt, Edgecombe, Wilson, Jackson, Granville, Stanly and Swain. 1899, c. 628.

3682. Trusts and monopolies. If any person in any way violate any of the provisions of the law against trusts and monopolies, he shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court, and each day such violation exists after conviction and final judgment in the first trial shall constitute a separate offense.

1901, c. 586, s. 12.

3683. Exposing children to fire. If any person shall leave any child, of the age of seven years or less, locked or otherwise confined in any dwelling, building or enclosure, and go away from said dwelling, building or enclosure, without leaving some person or persons of the age of discretion in charge of the same, and so as to expose said child or children to danger by fire, such person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court.

1893, c. 12.

3684. Disposing of cigarettes to minors. If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes or tobacco in the form of cigarettes, or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes, to any minor under the age of seventeen years, or if any person shall aid, assist or abet any person in selling such articles to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court.

1891, c. 76.

3685. Minor going in barroom, etc. If the keeper or owner of any barroom, billiard room, or bowling alley, shall allow any minor

to enter or remain in such barroom, billiard room, or bowling alley, if before such minor enters or remains in such barroom, billiard room, or bowling alley, the owner or keeper thereof has been notified by the parents or guardian of such minor not to allow such minor to enter or remain in such barroom, billiard room, or bowling alley, he shall be guilty of a misdemeanor and upon conviction be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1897, c. 278.

3686. Aiding minor to obtain cigarettes. If any person shall aid or assist any minor child under seventeen years of age in obtaining the possession of cigarettes, or tobacco in any form used as a substitute therefor, by whatsoever name it may be called, he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

1891, c. 76, s. 2.

3687. Selling certain weapons to a minor. If any person shall knowingly sell or offer for sale, give or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie-knife, dirk, loaded cane, or sling-shot, he shall be guilty of a misdemeanor.

1893, c. 514.

3688. Shooting rifles across Currituck sound. If any person shall shoot a rifle across or over the waters of Currituck sound, or the waters of Dare county, except in East Lake township, he shall be guilty of a misdemeanor and be fined not less than ten dollars nor more than fifty dollars, or imprisoned not less than ten days nor more than thirty days.

1889, c. 21, ss. 1, 2; 1903, c. 617.

3688a. Commercial feeding stuffs. If any person shall violate any regulation adopted by the board of agriculture for the enforcement of the law in reference to sale of concentrated commercial feeding stuffs, he shall be guilty of a misdemeanor.

1903, c. 325, s. 5.

3688b. Crop pests; preventing inspection. If any one shall seek to prevent inspection of his premises as provided in law for extermination of crop pests, or shall otherwise interfere with any agent of the commission while in performance of his duties, he shall, upon conviction, be fined not less than five nor more than fifty dollars for each offense, or may be imprisoned for not less than ten nor more than thirty days.

1897, c. 264, s. 4.

3688c. Fertilizers, sale of. If any person shall wilfully violate any regulation made by the commissioner and board of agriculture concerning the sale of commercial fertilizers, seeds, and food products, he shall be guilty of a misdemeanor.

1901, c. 479, s. 4, subsec. 9.

3688d. Insects, ravages of. If any person shall wilfully violate any regulation made by the commissioner and board of agriculture for the destruction of insect pests he shall be guilty of a misdemeanor.

1901, c. 479, s. 4, subsec. 4.

XXXIII. PUBLIC PROPERTY.

3689. Meridian monument, injuring, or failing to discharge duty in reference thereto. If any person shall in any manner injure, deface, remove or destroy any meridian monument or tablets, or any part thereof, or shall fail, neglect or refuse to do and perform any act, matter or thing by law required of him to be done in connection with such monuments or tablets, shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine or be imprisoned, or both, at the discretion of the court.

1899, c. 665, s. 3; 1893, c. 282, s. 4.

3690. Phosphate rock in rivers. If any person shall dig, mine or remove any phosphate rock or deposit from any of the navigable waters of this state, except for the purpose of prospecting and discovering as allowed by law, he shall be guilty of a misdemeanor, and shall also forfeit and pay ten dollars per ton for every ton of phosphate rock or deposit so mined, dug or removed, one-half to the use of the state, and the other one-half to go to the informer.

1891, c. 476, s. 8.

3691. Disorderly conduct in public buildings. If any person shall make any rude or riotous noise or be guilty of any disorderly conduct in or near any of the public buildings of the state, or shall write or scribble on, mark, deface, besmear, or injure the walls of any of the public buildings of the state, or any statue or monument, or who shall do or commit any nuisance in or near any public building of the state, he shall be guilty of a misdemeanor. The keeper of the capitol or any person in charge of any of the public buildings shall have authority to arrest summarily and without warrant for a violation of this section. The words "public buildings" as used in this section shall include the grounds around said buildings.

Code, ss. 2307, 2309; R. C., c. 103, ss. 7, 8; 1829, c. 29, ss. 1, 2; 1842, c. 47.

3692. Public grounds of state in Raleigh. If any person shall wilfully trespass upon any of the public lots belonging to the state in the city of Raleigh, or shall cut any timber or commit any waste, or shall refuse to surrender possession after the expiration of their leases, or if any person in possession of any of said lots above mentioned shall refuse to leave the same and shall further refuse to surrender possession within ten days after demand made by the keeper of the capitol, said person shall be guilty of a misdemeanor; and it shall be the duty of said keeper of the capitol to report all such violations of law to the governor or to the attorney general, and if any of the said persons shall be convicted, they shall be fined or imprisoned at the discretion of the court.

Code, s. 2313; 1870-1, c. 282, s. 4.

3693. Trespass on public lands. If any person shall erect a building on any public lands before the same shall have been sold or granted by the state, or on any lands belonging to the state board of education before the same shall have been sold and conveyed by them, or cultivate or remove timber from any of said lands, such person shall be guilty of a misdemeanor; and, when any person shall be in possession of any part of said land, it shall be the duty of the sheriff of the county in which the land is situated, and he is hereby required, to give notice in writing to such person, commanding him to depart therefrom forthwith; and if the person in possession, upon being so notified, shall not, within two weeks after the time of notice, remove therefrom, the sheriff is required to remove him immediately, and if necessary, shall summon the power of the county to assist him in so doing.

Code, s. 1121; R. C., c. 34, s. 42; 1823, c. 1190; 1842, c. 36, s. 4.

3694. Cutting timber on lands before obtaining a grant. If any person shall make an entry of any lands, and before perfecting title to same, shall enter upon such lands and cut therefrom any wood, trees or timber, he shall be guilty of a misdemeanor. One-half of any fine collected under this section shall be paid to the informer and one-half to the school fund of the county in which the land is situated. Any person found guilty under the provisions of this section shall further pay to the state double the value of the wood, trees or timber taken from the land, and it shall be the duty of the solicitor of the district in which the land lies to sue for the same.

1903, c. 272, s. 4.

XXXIV. RAILROADS.

3695. Unauthorized railroads. If any person shall make or establish any canal, turnpike, tramroad, railroad or plankroad, with intent to use the same to transport passengers other than persons or

members owning such canal or road, he shall be guilty of a misdemeanor. This section shall not apply to any narrow-gauge railroad or tramroad the principal business of which is the transportation of logs, lumber or other articles for the owners of such roads.

Code, s. 1717; 1901, c. 282.

3696. Discrimination in charges. If any common carrier shall directly or indirectly by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of law than it charges, demands or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; or shall make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or shall subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such person or corporation shall be upon conviction thereof fined not less than one thousand nor more than five thousand dollars for each and every offense.

1899, c. 164, s. 13.

3697. Unreasonable rates. If any railroad doing business in this state shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track or any of the branches thereof or upon any railroad in this state which has the right, license or permission to use, operate or control the same, it shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred nor more than five thousand dollars.

1899, c. 164, s. 12.

3698. Discriminating against Atlantic and North Carolina Railroad. If any railroad in North Carolina shall discriminate against the freights received from the Atlantic and North Carolina Railroad, or shall make rates by which, either directly or indirectly, by rebates or otherwise, freights may be delivered at less rate when received from other points than from points along the Atlantic and North Carolina Railroad in proportion to distance hauled, it shall be guilty of a misdemeanor, and shall be punished by a fine of not

less than one hundred dollars for each and every violation thereof. An indictment for the misdemeanor may be found and tried either in the courts where the goods were shipped or delivered, but the court in which the indictment for the offense is first found shall have exclusive jurisdiction.

1889, c. 358.

3699. Discrimination against connecting lines. If any common carrier shall not afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freights to and from their several lines and those connecting therewith, or shall discriminate in their rates and charges against such connecting lines, or if any connecting lines shall not make as close connection as practicable for the convenience of the traveling public, or shall not obey all rules and regulations made by the corporation commission relating to trackage, it shall be punished by a fine of not less than five hundred dollars nor exceeding five thousand dollars for each and every offense.

1899, c. 164, s. 21.

3700. Cattle killed in certain counties. If any cattle, horses, mules, sheep, or other live stock shall be killed or injured by any car or engine running on any railroad in the counties of Columbus, New Hanover, Brunswick, Bladen, Robeson, Richmond, Anson, Union, Gaston, Lincoln, Cleveland, Burke, Northampton, McDowell, Wayne, Duplin, Caldwell, Rockingham, Alamance, Chatham, Johnston, Craven and Edgecombe, it shall be a misdemeanor, and the president, receiver and the superintendent of such road, and also the engineer and conductor in charge of the train or engine by which such killing or injury is done, may be indicted for such killing or injury, and the party found guilty shall be fined not exceeding the sum of fifty dollars, or imprisoned not exceeding thirty days: Provided, if the parties indictable under this section shall within six months after the killing as aforesaid of any stock mentioned in this section, and before any indictment is preferred or warrant issued, pay the owner of such stock as may be killed his charges for said stock, or in the event the charges are too high, or thought to be so, such sum or sums as may be assessed by three commissioners, one to be chosen by the party whose stock is killed or injured, a second by the party accused of killing the same, and the third by the two commissioners chosen as above indicated, who shall meet at some place in the county where the stock is killed or injured, to be selected by the parties interested, within thirty days after they are chosen and accepted, such payment shall be a bar to any prosecution under

this section, and the decision of two of the said commissioners shall be final for the purposes of this section: Provided further, if any person or persons liable to an indictment under this section shall, within the time prescribed, propose to the party endamaged to refer the matter of damages in the manner hereinbefore indicated to three commissioners, and the party endamaged shall refuse or decline such proposition, such refusal or declining shall be a bar to any prosecution; such indictment shall not lie until a proposition to refer the matter has been made by the party claiming that he has been damaged: Provided, if the party endamaged shall at any time before the indictment is preferred, or warrant issued, directly or indirectly receive any sum in full compensation of his damages, such compensation shall be a bar to any prosecution under this section; and if any compensation be so received after indictment is preferred or warrant issued, or if after said time the party accused shall pay or tender to the owner of the stock killed the value of the same as decided by the commissioners, as above provided, in either case the prosecution shall go no further and the accused shall be charged only with accrued cost.

Code, ss. 2327, 2328, 2330; 1885, c. 32; 1880, c. 13, ss. 1, 2, 4.

3701. To construct cattle guards and crossings. If any incorporated company operating any railroad passing through and over the land of any person now enclosed, or which may hereafter become enclosed, shall fail, at its own expense, to construct and constantly maintain in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from said enclosed land, or shall fail to make and keep in constant repair crossings to any plantation road thereupon, such corporation shall be guilty of a misdemeanor, and fined in the discretion of the court.

Code, s. 1975; 1883, c. 394, ss. 1, 2.

3702. Pooling freights. If any person shall be concerned in pooling freights or shall directly or indirectly allow or accept rebates on freights he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one thousand dollars or imprisoned not less than twelve months.

Code, s. 1968; 1879, c. 237, s. 2.

3703. Officers failing to turn over property to successors. If the president and directors of the several railroads, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a felony,

and shall be punished by imprisonment in the state's prison for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a misdemeanor, and punished in like manner. The governor is hereby authorized, at the request of the president, directors, and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section.

Code, ss. 2001, 2002; 1870-1, c. 72, ss. 1, 2, 3.

3704. Arrangement of cars. If any officer or agent of a railroad company in the arrangement of cars in a train shall direct or knowingly suffer baggage, freight, merchandise, or lumber cars to be placed in the rear of passenger cars, except in case of accident, or when cars are provided with automatic couplers or brakes, he shall be guilty of a misdemeanor: Provided, this section shall not apply to the Wilmington Sea-coast Railroad Company.

Code, s. 1971; 1893, c. 331; 1895, c. 212; 1871-2, c. 138, s. 37.

3705. Engineer, conductor, brakeman intoxicated. If any person shall, while in charge of a locomotive engine running upon the railroad of any such corporation or while acting as the conductor or brakeman of a car or train of cars on any such railroad, be intoxicated, he shall be guilty of a misdemeanor.

Code, s. 1972; 1891, c. 114; 1871-2, c. 138, s. 38.

3706. Injuring or obstructing. If any person shall wilfully and maliciously put or place any matter or thing upon, over, or near any railroad track; or shall wilfully and maliciously destroy, injure, or remove the road-bed, or any part thereof, or any rail, sill, or other part of the fixture appurtenant to, or constituting or supporting any portion of the track of such railroad; or shall wilfully and maliciously do any other thing with intent to obstruct, stop, hinder, delay, or displace the cars traveling on such road, or to stop, hinder or delay the passengers or others passing over the same; or shall wilfully and maliciously injure the road-bed or the fixtures aforesaid, or any part thereof, with any other intent whatsoever, such person so offending shall be guilty of a misdemeanor, and fined not exceeding one thousand dollars nor less than two hundred dollars, and be imprisoned in the state's prison or county jail not less than four months nor more than ten years, and shall be committed to jail till he find surety for his good behavior, for a space of time not less than three nor more than seven years. And if it shall happen that by reason of the commission of the offenses aforesaid, or any of them, any engine or car shall be displaced from the track, or shall be stopped,

hindered or delayed, so that any one thereby be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or be disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, on conviction, shall suffer death, if the persons were killed, and shall be imprisoned in the state's prison not less than five nor more than sixty years, if the persons were maimed or disabled. And if any person shall maliciously destroy or injure any plank-road, turnpike or canal, or any appurtenance or fixture belonging thereto, or used therewith, or shall maliciously destroy or injure any lock, dam or sluice, the same being a part of any work erected or made for the purpose of navigation, or improving the navigation of any water, the person so offending shall be guilty of a misdemeanor, and shall suffer the like punishment as in this section provided for maliciously injuring a railroad.

Code, s. 1098; R. C., c. 34, ss. 99, 100; 1838, c. 38; 1879, c. 255, s. 2.

3707. Injuries to, without malice. If any person, unlawfully and on purpose, but without malice, shall commit any of the offenses mentioned in the preceding section, he shall be guilty of a misdemeanor. And if it shall happen that by reason of the commission of any such offense any person shall be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, shall be imprisoned not less than twelve months, and fined, at the discretion of the court.

Code, s. 1099; R. C., c. 34, s. 101.

3708. Injuries to property. If any person or persons shall wilfully do or cause to be done any act or acts whatever whereby any building, construction or work of any railroad corporation, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a misdemeanor.

Code, s. 1974; 1871-2 c. 138, s. 39.

3709. Beating way on trains. If any person other than a railroad employee in the discharge of his duty, without authority from the conductor of the train or by permission of the engineer and with the intention of being transported free and without paying the usual fare for such transportation, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this state, or on the draw-heads between cars, or under cars on truss rods, or trucks, or in any freight car, or on a platform of any baggage car,

express car or mail car on any train, he shall be guilty of a misdemeanor. Any person charged with a violation of this section may be tried in any county in this state through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered.

1899, c. 625.

3710. Entering cars after forbidden. If any person shall enter into a railroad passenger car, or baggage car, or mail car, or caboose car, or upon the platforms of said cars after being forbidden so to do by the conductor or his assistants, or the baggage master or other person in charge of said cars, unless said persons enter said cars or on said platforms as a passenger or in some official capacity authorized by law, or on business with a passenger or some official or employee of the railroad or other like purpose, for every violation of this section the person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding ten dollars.

Code, s. 1979; 1883, c. 351.

3711. Passengers with second-class tickets riding in first-class cars. Any passenger purchasing or holding a second-class ticket, after being requested or directed by any conductor or other officer in charge of any train on any railroad or steamboat in this state, riding in any first-class coach or cabin, refuses to pay the difference between a first-class and a second-class fare or rate, or refuses to go into the second-class coach or cabin of any railroad or steamboat company, when there shall be a comfortable second-class coach or cabin in said train or on said steamboat, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any justice of the peace in the county where such offense is committed shall have jurisdiction of said offense, upon sworn complaint of any officer of such railroad or steamboat company.

1903, c. 795.

3712. Intoxicated person entering train. If any intoxicated person, after being forbidden by the conductor, captain, or other person having charge of any railroad train, steamboat, or other conveyance for the use of the traveling public, shall enter such train, boat or other conveyance he shall for every violation of this section be guilty of a misdemeanor.

1885, c. 358, s. 3.

3713. Train robbery. If any person shall enter upon any locomotive engine, car or cars on any railroad in this state, and by threats, the exhibition of deadly weapons, or by the discharge of any

pistol or gun on, in or near any such engine, car or cars, shall induce or compel any person on such engine, car or cars, to submit and deliver up, or allow to be taken therefrom, or from him anything of value, he shall be guilty of train robbery, and on conviction thereof, shall be punished by imprisonment in the state's prison not less than ten years nor more than twenty years.

1895, c. 204, s. 2.

3714. Train robbery, attempt. If any person or persons shall stop, or cause to be stopped, or impede, or cause to be impeded, or conspire together for that purpose, any locomotive engine, or any car or cars, on any road in this state, by intimidation of those in charge thereof by force, threats, intimidation, or otherwise, of taking therefrom or causing to be delivered up to such person or persons forcing, threatening or intimidating, anything of value, to be appropriated to his or their own use, he shall be guilty of attempting train robbery, and, on conviction thereof, shall be punished by confinement in the state's prison not less than two years nor more than twenty years.

1895, c. 204, s. 1.

3715. Shooting or throwing at cars. If any person shall wilfully and unlawfully cast, or throw, or shoot any stone, rock, bullet, shot, pellet, or other missile, at, against or into, any railroad car, locomotive or train, while the said car or locomotive shall be in progress from one station to another, or while the said car, locomotive or train shall be stopped for any purpose, the person so offending shall be guilty of a misdemeanor, and punished by fine or imprisonment in the county jail or state's prison, at the discretion of the court.

Code, s. 1100; 1887, c. 19; 1876-7, c. 4.

3716. Tickets, unlawful sale of. If any person shall sell or deal in tickets issued by any railroad company, unless he is a duly authorized agent of said railroad company, or shall refuse upon demand to exhibit his authority to sell or deal in said tickets he shall be guilty of a misdemeanor.

1895, c. 83, s. 1.

XXXV. ROADS AND BRIDGES.

3717. Bridges, injuring. If any person shall unlawfully and wilfully demolish, destroy, break or tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the state, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court.

Code, s. 993; 1883, c. 271.

3718. Bridges, failure to repair. If any owner of a water mill, situated on any public road or any other person whose duty it is to keep up and repair bridges built across any ditch, drain, or canal, in the chapter entitled Roads, Bridges and Ferries, shall refuse or neglect to keep up and repair, or shall suffer to remain out of repair for the space of ten days, any bridge which by law he may be required to keep up and repair, he shall be guilty of a misdemeanor.

Code, s. 1086; R. C., c. 34, s. 40; 1819, c. 941, s. 3.

3719. Bridges, failure to maintain. If any person, who is liable to keep up and maintain any bridge across the public road, as provided by section thirty-seven hundred and eighteen, shall permit such bridge to remain out of repair for ten days, unless unavoidably prevented, he shall be guilty of a misdemeanor.

Code, s. 2037; R. C., c. 101, s. 25; 1817, c. 941, s. 2; 1876-7, c. 90; 1876-7, c. 211.

3720. Bridges, vessels not fastened to. If any person shall fasten any decked vessel or steamer to any bridge that crosses a navigable stream, he shall be guilty of a misdemeanor, and in the case of a bridge that crosses a county line, may be prosecuted in either county.

Code, s. 2050; 1887, c. 93, s. 3; R. C., c. 101, s. 31; R. S., c. 104; 1858-9, c. 58, s. 1.

3721. Bridges, failure of railroads, etc., to keep up. If any railroad, plank-road, or turnpike company shall fail to keep up, at its own expense, all bridges on or over county or incorporated roads, which they have severally made it necessary to be built in establishing their respective roads, it shall be guilty of a misdemeanor, and fined.

Code, s. 2054; R. C., c. 101, s. 35; 1838, c. 5, ss. 1, 2, 3, 4.

3722. Barbed wire fences along. If any person shall erect a barbed wire fence along any public road or highway, without putting a railing or plank on top of said fence not less than three inches in width, he shall be guilty of a misdemeanor and fined or imprisoned at the discretion of the court. This section shall apply to the counties of Rowan, Swain, Haywood, Catawba, Greene, Richmond, Stokes, Rutherford, Forsyth, Yadkin, Brunswick, Durham, Wilkes, Stanly, Cumberland, Iredell and Macon.

1895, c. 65; 1899, c. 43; 1899, c. 225.

3722a. Board of supervisors failing to make reports. If any board of supervisors shall fail to make any report required by law, or to discharge any duty imposed by law, they shall be guilty of a misdemeanor. The indictment may be against the board, jointly, or

against the justices composing said board, or any one or more of them severally.

Code, s. 2024; 1879, c. 82, s. 10.

3723. Churches, way to. If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days.

Code, s. 3669; R. C., c. 97, s. 5; 1785, c. 241.

3724. Damage to roads by hauling logs, how paid. If any of the public roads in Anson, Beaufort, Bertie, Clay, Columbus, Currituck, Dare, Gates, Halifax, Lenoir, Macon, Pasquotank, Pitt, Rutherford, Stokes, Swain, Tyrrell and Yancey counties shall be used by any person engaged in hauling logs or wood, whether such hauling be by the employees or agents of any other person, company or corporation, or by contractors for any other person, company or corporation, and the public roads shall become damaged by such use, upon complaint made to the chairman of the board of supervisors of the public roads of the township in which such damaged road is situated, he shall summon the person, company or corporation, or the manager of such person, company or corporation, alleged by such complainant to have damaged such road, before a called or regular meeting of the board of road supervisors of such township in which such alleged damaged road is situated, within ten days after complaint is made to him, and said board of road supervisors shall investigate by visiting and inspecting such damaged road, and they shall hear evidence on oath, as to the condition of such damaged road and the cause of its bad condition, and the damage done to such road by the hauling of logs over such road by such person, company or corporation; and if the board of supervisors shall find such road or any part thereof damaged by the hauling of logs over the same, the person, company or corporation, or their agents, employees or contractors, alleged in the complaint to have damaged such road or any part thereof, they shall assess against such person, company, or corporation an amount of money sufficient to repair such road. And the board of road supervisors shall return to the clerk of the superior court the amount of such assessment as a judgment of the board of township road supervisors, and the clerk shall docket this transcript and it shall thereupon become a judgment of the superior court, and the clerk shall issue execution against such delinquent person or corporation for the assessed damages as other executions and the sheriff shall pay the proceeds of said judgment to the clerk of the superior

court, to be applied by the board of township supervisors to the repair of such damaged road.

1889, c. 503, ss. 1, 3; 1893, c. 416; 1899, c. 712; 1901, c. 189.

3725. Damage to road by hauling logs or wood. If any person, company or corporation who shall damage any public road, bridge or causeway by hauling logs or sawmill timber, or railroad, or shipping wood thereon, and shall not repair the damage done thereto within five days after being notified of said damage by the overseer of said road, or by any member of the board of supervisors of the township in which said damaged road is situated, he shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than fifty dollars, or be imprisoned not exceeding thirty days: Provided, if any person shall pay the damage as assessed by the board of supervisors for injury to such road, the payment of said damages shall be a complete bar to any criminal prosecution under this section, and if any criminal prosecution shall have been commenced prior to the payment of said damages, all further proceedings in said criminal prosecution may be ended by the defendant paying the cost necessarily incurred in said criminal prosecution and satisfying the court that said damages and all proper costs have been paid.

1893, c. 416, s. 2.

3726. Failure to work. If any person liable to work on the road shall fail to attend and work, as provided by law, when summoned so to do, unless he shall have paid the one dollar as provided, he shall be guilty of a misdemeanor, and fined not less than two dollars nor more than five dollars, or imprisoned not exceeding five days, and if any defendant shall be unable to discharge the judgment and costs that may be recovered against him, the costs shall be paid by the county.

Code, s. 2020; 1885, c. 392; R. C., c. 101, s. 11; 1817, c. 935, s. 2; 1825, c. 1287; 1879, c. 82, s. 6.

3727. Gates across public roads, leaving open. If any person shall leave open, break down or otherwise injure any gate lawfully across any public road, he shall forfeit and pay for every such offense ten dollars to the person erecting the same or his assigns of the land, and if the offense shall be maliciously or wantonly done, he shall be guilty of a misdemeanor.

1885, c. 45.

3728. Gates across, injury to. If any person shall leave open, break down or otherwise injure any gates erected across a public road by authority from the board of road supervisors of the town-

ship, he shall forfeit and pay for every such offense ten dollars to the person erecting the same or his assigns of the land, and if the offense shall be maliciously done, he shall be guilty of a misdemeanor.

Code, s. 2058; 1885, c. 45.

3729. High-water signals established. If any overseer of roads shall fail to establish high-water marks or signals on both sides of any river, creek or stream which is used as a ford for a public highway, and to permanently fix the same, he shall be guilty of a misdemeanor.

1889, c. 517.

3730. Injury to sign-boards or mile-posts. If any person shall needlessly remove, knock down or deface any public sign-post, arms, or any mile-mark, he shall be guilty of a misdemeanor.

Code, s. 2031; R. C., c. 101, s. 19; 1784, c. 227, s. 11; 1812, c. 846.

3731. Obstruction of roads. If any person shall wilfully alter, change or obstruct any highway, cartway, mill road or road leading to and from any church or other place of public worship, whether the right of way thereto be secured in the manner provided for by law or by purchase, donation or otherwise, such person shall be guilty of a misdemeanor, and fined or imprisoned, or both. If any person shall hinder or in any manner interfere with the making of any road or cartway laid off according to law, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court.

Code, s. 2065; 1872-3, c. 189, s. 6; 1883, c. 383.

3732. Overseer; neglect of duty. If any overseer of a road shall wilfully neglect any of the duties imposed on him by law, he shall be guilty of a misdemeanor, and fined not to exceed fifty dollars or imprisoned not to exceed thirty days.

Code, s. 1054; 1889, c. 504; R. C., c. 34, s. 39; 1786, c. 256, s. 4.

3733. Fast driving over bridges. If any person shall ride or drive over any public bridge at a rate of speed faster than a walk, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that this section shall not apply to any bridge unless the county commissioners shall keep posted at each end of such bridge a notice forbidding the riding or driving over such bridge at a rate of speed faster than a walk.

XXXVI. REVENUE.

3734. Agent of corporation failing to pay taxes. If any agent or officer of a corporation, after having been notified by the sheriff or tax collector that the taxes assessed against such corporation are delinquent, shall fail or refuse to pay over to the sheriff or tax collector all moneys in his hands, or which may afterwards come into his hands, belonging to such corporation, not exceeding the amount of the taxes due, he shall be guilty of a misdemeanor, and fined not less than fifty nor more than five hundred dollars.

1901, c. 558, s. 29.

3735. License tax, failure to pay. If any person liable for any license tax fail or refuse to pay such tax when demanded by the sheriff, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, at the discretion of the court.

1903, c. 247, s. 87.

3736. Officer failing to surrender tax list. If any sheriff or tax collector shall refuse or fail to surrender his tax list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a misdemeanor, and imprisoned not more than five years, and fined not exceeding one thousand dollars, at the discretion of the court.

Code, s. 3823; 1870-1, c. 177, s. 2.

3737. Sheriff failing to attend tax sale; selling property not liable. If any sheriff shall fail to attend any sale of lands as required by law in regard to tax sales, either in person or by competent deputy, he shall be guilty of a misdemeanor and liable to a penalty of three hundred dollars, to be recovered by an action in the superior court against the sheriff and his bondsmen. And if such officer or deputy shall sell or assist in selling any real property, knowing the same not to be subject to taxation, or that the taxes for which the same is sold have been paid, or shall knowingly and willingly sell or assist in selling any real property for payment of taxes to defraud the owner of such real property, or shall knowingly or willingly execute a deed for property so sold, he shall be guilty of a misdemeanor, and be liable to a fine of not less than one thousand nor more than three thousand dollars, or to imprisonment not exceeding one year, or to both fine and imprisonment, and to pay to injured party all damages sustained by such wrongful act, and all such sales shall be void.

1901, c. 558, s. 6.

3738. Tax commissioners may examine books. If any corporation, firm or individual shall, upon demand, refuse to permit the

state tax commissioners, or any one of them, to examine the books, papers and account of such corporation, firm or individual, for the purpose of obtaining information as to property liable to be assessed for taxation, under any of the laws of this state; or if any person shall refuse to appear before the state tax commissioners, or any member thereof, when subpoenaed so to do, or shall upon such appearance fail or refuse to testify, he shall be guilty of a misdemeanor, and fined not exceeding one thousand dollars, or imprisoned in the state's prison not exceeding two years, or both, in the discretion of the court.

1901, c. 7, s. 4; 1903, c. 251, s. 4.

3739. Peddling without license. If any person shall unlawfully hawk or peddle any goods, wares or merchandise, or shall fail, upon the application of the sheriff or his deputy, or any justice of the peace, to show his license as required by law, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Code, s. 1091; 1889, c. 504; R. C., c. 34, s. 44; 1835, c. 17, s. 3.

3740. Stevedores to obtain license. If any person shall engage in the business of loading or unloading vessels upon contract, or if any person shall solicit or make any contract for himself or for any other person to load or unload any vessel, either by day's work or by the job for the owners, master, consignee or shipper, or do or perform any other of the work usually performed by contracting or boss stevedores, without having previously obtained license from the sheriff in the manner provided by law, he shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court.

1891, c. 450, s. 1; 1899, c. 595.

XXXVII. SAFETY.

3741. Dynamite cartridges, exploding. If any person shall fire off, explode, or cause to be fired off or exploded, except for mechanical purposes in a legitimate business, any dynamite cartridge, bomb, or other explosive of a like nature, he shall be guilty of a misdemeanor.

1887, c. 364, s. 3.

3742. Marl beds, failure to enclose. If any person shall open any marl bed without surrounding it with a lawful fence, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Pro-

vided, this shall not apply to any person whose marl bed is enclosed inside said enclosure.

1887, cc. 235, 268.

3743. Mines. If any person shall knowingly violate any of the provisions of the law relating to mines or shall do anything whereby the life or health of persons or the security of any mine and machinery is endangered, or if any miner or other person employed in any mine governed by the statutes shall intentionally or wilfully neglect or refuse to securely prop the roof of any working place under his control, or neglect or refuse to obey any orders given by the superintendent of a mine in relation to the security of a mine in the part thereof where he is at work and for fifteen feet back of his working place, or if any miner, workman or other person shall knowingly injure any water-gauge, barometer, air course or brattice, or shall obstruct or throw open any air ways, or shall handle or disturb any part of the machinery of the hoisting engine or signaling apparatus or wire connected therewith, or air pipes or fittings, or open a door of the mine, and not have the same closed again, whereby danger is produced either to the mine or those that work therein, or shall enter any part of the mine against caution, or shall disobey any order given in pursuance of law, or shall do any wilful act whereby the lives and health of the persons working in the mines or the security of the mine or the machinery thereof is endangered, or if the person having charge of a mine whenever loss of life occurs by accident connected with the machinery of such mine or by explosion shall neglect or refuse to give notice thereof forthwith by mail or otherwise to the inspector and to the coroner of the county in which such mine is situated, or if any such coroner shall neglect or refuse to hold an inquest upon the body of the person whose death has been thus caused, and return a copy of his findings and a copy of all the testimony to the inspector, he shall be guilty of a misdemeanor, and upon conviction fined not less than fifty dollars or imprisoned in the county jail not more than thirty days, or both.

1897, c. 251, s. 8.

3744. Street cars to have vestibule fronts. If any city and street passenger railway company shall refuse or fail to use vestibule fronts, or frontage not less than four feet, on all passenger cars run, manipulated or transported by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year, except in cases of temporary emergency in suitable weather, not to exceed four days in any one month within the period herein prescribed for use of vestibule fronts, such company shall be guilty of a misdemeanor and shall be sub-

ject to a fine of not less than ten dollars or more than one hundred dollars for each day: Provided, that said companies shall not be required to close the sides of said vestibules. The North Carolina corporation commission is hereby authorized to make exemptions from the provisions of this section in such cases as in their judgment the enforcement of this section is unnecessary.

1901, c. 743, s. 1.

3745. Street cars to have fenders. If any city and street passenger railway company shall refuse or fail to use practical fenders in front of all passenger cars run, manipulated or transported by them, such company shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars or more than one hundred dollars for each day. The North Carolina corporation commission is hereby authorized to make exemptions from the provisions of this section in such cases as in their judgment the enforcement of this section is unnecessary.

1901, c. 743, s. 2.

XXXVIII. SALES.

3746. Butchers to keep record. If any butcher shall fail to keep a book of registration and register the ear-mark, brand or flesh-mark of all cattle, sheep, swine or goats, and the name of the parties purchased from in said registration, and the date of said purchase, which registration shall be open to the inspection of all persons, he shall be guilty of a misdemeanor, and upon conviction shall pay a fine of fifty dollars for each offense: Provided, this shall only apply to the counties of Rockingham, Bertie, Edgecombe, Halifax, Martin, Orange, Pitt, Wilson, Wayne, Johnston, Richmond, Northampton, Franklin, Craven and Chowan; and Warsaw township in Duplin county.

1889, c. 318; 1895, c. 363; 1891, c. 38; 1891, c. 557; 1893, c. 116; 1903, c. 82.

3747. Corn, sale of, in certain counties. If any person shall buy, sell, deliver, or receive for a price or for any reward whatever, any corn in the ear or shelled of a less amount than five bushels, between the hours of sunset and sunrise, he shall be guilty of a misdemeanor, and upon conviction be punished by a fine not exceeding fifty dollars or imprisoned not exceeding thirty days. In all prosecutions under this section it shall only be necessary for the state to allege and prove that the defendant bought or received the corn as charged, and the burden shall be upon the defendant to show that the provisions of this section have been complied with: Provided, this section shall only apply to the counties of Beaufort, Hyde, Martin, Tyrrell, Washington, Pamlico, Halifax and Edgecombe.

1889, c. 90; 1891, c. 6; 1891, c. 8.

3748. Cotton in seed, sale of. If any person shall buy, sell, deliver or receive for a price, or for any reward whatever, any cotton in the seed where the quantity is less than what is usually baled, and shall fail to enter upon a book to be kept by him for such purpose the date of such buying or receiving, the number of pounds in each lot, the person or persons from whom bought or received, and the price paid for the same per pound, which book shall be open to inspection by the public at all business hours of the day, he shall be guilty of a misdemeanor, and upon conviction be punished by a fine not exceeding fifty dollars or imprisoned not exceeding thirty days. In all prosecutions under this section it shall only be necessary for the state to allege and prove that the defendant bought or received the seed cotton as charged, and the burden shall be upon the defendant to show that the provisions of this section have been complied with.

1887, c. 199.

3749. Cotton, inspection and sale of, in certain counties. If any buyer of baled cotton shall fail to inspect all baled cotton when purchased and before the same is delivered, or shall make any deduction from the price agreed to be paid therefor on account of any inspection made after delivery of the same, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. This section shall apply only to the counties of Stanly, Cabarrus, Montgomery, Anson, Catawba, Richmond and Rowan: Provided, this section shall not have the effect to prevent a deduction or rebate on the price agreed for fraudulent baling or packing of cotton or to prevent an indictment for false pretenses in the counties of Montgomery, Rowan and Stanly.

1891, c. 287; 1899, c. 320.

3750. Cotton, sale of, at night. If any person shall buy, sell, deliver or receive, for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint cotton, brought or carried in a basket, hamper or sheet, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor.

Code, s. 1006; 1873-4, c. 62; 1874-5, c. 70.

3751. Cotton, weighing of. If any weigher or purchaser of cotton shall make any deduction from the weight of any bag, bale or package of lint cotton, for or on account of the draft, turn or break of the scales, steelyards, or other implement used in weighing the same, or for any other cause except as herein allowed, the person so

offending shall be guilty of a misdemeanor, and fined three hundred dollars or imprisoned, in the discretion of the court: Provided, that the weigher may make such proper deduction as shall be agreed on by him, and the seller, or his agent, for water, dirt or other foreign substance, in or on such bag, bale, or package of cotton, or for other just cause.

Code, s. 1007; 1874-5, c. 58, ss. 1, 3.

3752. Cotton weigher failing to file oath. Every public weigher of cotton shall, before entering on the duties of his office, make and subscribe the oath prescribed for cotton weighers, which, when made, shall be filed in the office of the register of deeds for the county in which the person acts as weigher, and said register shall make a note of the same, and any person acting as weigher without making and filing the oath, shall be guilty of a misdemeanor, and shall be fined twenty-five dollars for every bag, bale, or package of cotton which he shall have unlawfully weighed before being qualified to do so.

Code, s. 1008; 1874-5, c. 58, s. 2.

3754. Cotton-seed meal, sale of, not having been inspected. If any person shall sell or offer for sale any cotton-seed meal, which has not been inspected and branded as required by law, or shall sell any cotton-seed meal containing a less quantity of ammonia than seven and one-half per cent., except as authorized by law, or shall violate any regulation or rule made by the state board of agriculture regulating the sale, inspection, branding or tagging of cotton-seed meal, he shall be guilty of a misdemeanor.

1903, c. 339, ss. 3, 4, 5.

3755. Obstructing inspector of concentrated feeding stuff in duties. If any person shall impede, obstruct, hinder or otherwise prevent or attempt to prevent any inspector or other person in the performance of his duty in collecting samples, or otherwise in connection with the inspection or sale of concentrated feed stuffs, he shall be guilty of a misdemeanor, and be fined not more than fifty dollars or imprisoned not more than thirty days.

1903, c. 325, s. 8.

3756. Selling concentrated feeding stuff, taxes not paid. If any manufacturer, importer, jobber, agent or seller shall sell, offer or expose for sale, or for distribution in this state, any concentrated commercial feeding stuff as defined by law without complying with the requirements of the law as to branding the same, and as to filing samples with the commissioner of agriculture, or tagging the same, and paying the tax thereon, or in any other way shall sell or

offer or expose for sale or distribution any concentrated commercial feeding stuff which contains substantially a smaller percentage of constituents than are certified to be contained, or who shall adulterate any feeding stuff with foreign, mineral, or other substance or substances, or with substances injurious to the health of domestic animals, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars for each offense, or imprisoned not exceeding thirty days, and the lot of feeding stuff in question shall, in addition, be subject to seizure, condemnation and sale by the commissioner of agriculture, as prescribed for the seizure, condemnation and sale of commercial fertilizers in this state. The proceeds from sales under seizure shall be covered into the state treasury for the use of the department of agriculture in executing the provisions of this section.

1903, c. 325, s. 6.

3757. Dynamite, selling without a license. If any dealer or other person shall sell, or keep for sale any dynamite cartridges, bombs, or other combustibles of a like kind, without first having obtained from the board of commissioners of the county where such person or dealer resides a license for that purpose, he shall be guilty of a misdemeanor.

1887, c. 364, ss. 1, 4.

3758. Fertilizers; officers and agents of transportation companies to furnish information. If any officer, agent, or manager of any railroad, steamboat or other transportation company transporting fertilizers or fertilizing material into this state shall, when required by the department of agriculture so to do, fail or refuse to furnish monthly statements of the quantity of such fertilizers with the names of the consignor and consignee and the name of the brand delivered on their respective lines at all points within this state, or shall fail or refuse to submit the books of such transportation company for examination, he shall be guilty of a misdemeanor.

1901, c. 479, s. 10.

3759. Fertilizers containing matter not available as plant food. If any person shall wilfully sell or offer for sale any fertilizer or fertilizer material which contains hair, hoof-meal, horn, leather scraps or other deleterious substances not available as food for plants, but in which said forbidden materials aid in making up the required or guaranteed analysis, he shall be guilty of a misdemeanor.

1901, c. 479, s. 9.

3760. Fertilizers; removal or sale of, after condemned. If any fertilizer shall be condemned, as by law provided, it shall be the

duty of the agricultural department to have an analysis made of the same and cause printed tags or labels expressing the true chemical ingredients of the same to be put upon each bag, barrel or package, and shall fix the commercial value thereof at which it may be sold, and any person who shall sell, offer for sale or remove any such fertilizer, or any agent of any railroad or other transportation company who shall deliver any such fertilizer in violation of this section shall be guilty of a misdemeanor.

1901, c. 479, s. 8.

3761. Fertilizers, sale of, without tags. If any person shall sell or offer for sale any fertilizer or fertilizing material not having attached thereto the tags and labels required by law, he shall be guilty of a misdemeanor.

1901, c. 479, s. 5.

3762. Future delivery contracts. If any person shall become a party to any contract for the sale and future delivery of any article of personal property in which it is not intended by the parties thereto that such property shall be actually delivered, but the difference between the contract price and the market price on the day of delivery shall be paid in money, or if any person shall be the agent, directly or indirectly, of any such party in making or furthering or effectuating the same; or if any agent or officer of any corporation shall, in any way or manner, knowingly aid in making or furthering any such contract to which such corporation shall be a party, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the discretion of the court.

1889, c. 221, s. 3.

3763. Future delivery; contract made in another state. If any person shall, while in this state, consent to become a party to any contract contrary to preceding sections, made in another state, or if any person shall, as agent of any person or corporation become a party to any such contract made in another state, or in this state do any act, or in any way aid in the making or furthering such contract so made in another state, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than fifty nor more than two hundred dollars, and may be imprisoned in the discretion of the court.

1889, c. 221, s. 4.

3764. Oleomargarine sold without label. If any person shall sell, keep for sale, or offer for sale any oleomargarine or butterine, without having securely affixed on each package, tub or firkin

thereof, a label on which shall be printed in large roman type the chemical ingredients and the proportions thereof, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars, or be imprisoned not exceeding thirty days; and for each subsequent offense be fined not less than two hundred dollars or imprisoned not less than six months, or both, in the discretion of the court. For the purposes of this section any article manufactured or compounded in imitation or semblance of butter, or which shall be composed of any ingredient in combination with butter, shall be deemed to be oleomargarine and butterine.

1895, c. 106.

3765. Spirits of turpentine, adulteration of. If any person shall adulterate or cause to be adulterated, any spirits turpentine, or shall knowingly sell or offer for sale as pure spirits turpentine, any adulterated spirits turpentine, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars, or imprisoned for thirty days, or both, at the discretion of the court, for each and every offense.

1897, c. 482.

3766. Warehouse, unlawfully disposing of property stored in public. If any person unlawfully sells, pledges, lends or in any other way disposes of or permits or is a party to the unlawful selling, pledging, lending, or other disposition of any goods, wares, merchandise, or anything deposited in a public warehouse without the authority of the party who deposited the same, he shall be punished by a fine not to exceed two thousand dollars and by imprisonment in the state's prison for not more than three years, but no officer, manager or agent of such public warehouse shall be liable to the penalties provided in this section, unless with the intent to injure or defraud any person, he so sells, pledges, lends, or in any other way disposes of the same, or is a party to the selling, pledging, lending or other disposition of any goods, wares, merchandise, article or thing so deposited.

1901, c. 678, s. 11.

XXXIX. SCHOOLS.

3767. Agents for sale of supplies not to be officers. If any member of any board of directors, board of managers, board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the state, or any member of any board of education, or any county or district superintendent or examiner of teachers, or any school trustee of any school or other institution supported in whole or in part from any of the public funds of the state, or

any officer, agent, manager, teacher or employee of said boards shall have any pecuniary interest, either directly or indirectly, proximately or remotely, in supplying any goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or schools; or if any of said officers, agents, managers, teachers or employees of said institution or school or state or county officer shall act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or schools; or shall receive, directly or indirectly, any gift, emolument, reward or promise of reward for their influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever to any of the said institutions or schools, he shall be forthwith removed from his position in the public service, and shall upon conviction be deemed guilty of a misdemeanor and fined not less than fifty dollars nor more than five hundred dollars and be imprisoned, in the discretion of the court.

1899, c. 732, s. 73; 1897, c. 543.

3768. Books, selling at greater than contract price. If any dealer, clerk, or agent shall sell any book adopted by the text-book commission for a greater price than the contract price he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding fifty dollars.

1901, c. 1, s. 19.

3769. Buying supplies from interested officer. If any county board of education or school committee shall buy school supplies in which any member has a pecuniary interest, or if any school officers or teachers shall receive any gift, emolument, reward or promise of reward for influence in recommending or procuring the use of any school supplies for the schools with which they are connected, such person shall be removed from his position in the public service and shall, upon conviction, be deemed guilty of a misdemeanor.

1901, c. 4, s. 69.

3770. Census returns, false. If any person who is a member of the school committee of any district, as such, shall knowingly and wilfully take false or inaccurate census, or make a false or inaccurate return or report to the county superintendent of public instruction of the number of children in his district between the ages of six and twenty-one, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined and imprisoned at the discretion of the court.

1889, c. 353.

3771. Duty, failure of officer to discharge. If any officer shall fail to perform any of the duties required of him, in regard to the appropriation or distribution of the fund to bring the schools up to a four months' term or shall knowingly make any misrepresentation of facts in any report required of him in reference to such fund, he shall be guilty of a misdemeanor, and upon conviction shall be removed from his office and fined or imprisoned, in the discretion of the court.

1903, c. 751, s. 8.

3772. Disturbing. If any person shall wilfully interrupt or disturb any public or private school or temperance society or organization or any meeting lawfully and peacefully held for the purpose of literary and scientific improvement, or for the discussion of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building, or deface any school furniture, apparatus, or other school property, or property of any temperance society or organization, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not more than thirty days.

Code, s. 2592; 1885, c. 140; 1901, c. 4, s. 28.

3773. Treasurer failing to report. If any treasurer of the county school fund shall fail to make reports required of him at the time and in the manner prescribed, or to perform any other duties required of him by law, he shall be guilty of a misdemeanor, and be fined not less than fifty dollars and not more than two hundred dollars, or imprisoned not less than thirty days, nor more than six months, in the discretion of the court.

1901, c. 4, s. 53.

3774. Witness failing to appear and testify. If any witness shall wilfully and without legal excuse fail to appear before the county board of education to testify in any matter under investigation by the board, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days.

1901, c. 4, s. 15.

XI. SUNDAY.

3775. Hunting wild fowl on Sunday, and at night. If any person shall hunt or shoot wild birds or fowl on Sunday; or hunt or shoot them, except crows and hawks, on any day of the week after the hour of sunset and before the hour of daylight, with gun or fire, or use any gun other than can be fired from the shoulder he shall be

guilty of a misdemeanor, and fined not less than one hundred dollars or imprisoned not less than thirty days.

Code, ss. 2837, 2838; 1885, c. 30; 1870-1, c. 27, s. 2; 1874-5, c. 259.

3777. Sunday, fishing with nets on. If any person fish on Sunday with a seine, drag-net or other kind of net, except such as is fastened to stakes, he shall be guilty of a misdemeanor, and fined not less than two hundred nor more than five hundred dollars or imprisoned not more than twelve months.

Code, s. 1116; 1883, c. 338.

Note. This section does not apply to Onslow county so far as established seines are concerned. 1885, c. 171; 1889, c. 23.

3778. Sunday, hunting on. If any person shall, except in defense of his own property, hunt on Sunday with a dog, or shall be found off his premises on Sunday, having with him a shotgun, rifle or pistol, he shall be guilty of a misdemeanor, and pay a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days.

Code, s. 3783; 1868-9, c. 18, ss. 1, 2.

3779. Running trains on. If any railroad company shall permit the loading or unloading of any freight car on Sunday, or shall permit any car, train of cars, or locomotive to be run on Sunday on any railroad, except such as may be run for the purpose of transporting the United States mails, and passengers with their baggage, and ordinary express freight in an express car exclusively, and such as may be run by law, such railroad company shall be guilty of a misdemeanor in each county in which such car, train of cars or locomotive shall run, or in which any such freight car shall be loaded or unloaded, and upon conviction shall be fined not less than five hundred dollars for each offense: Provided, that the word Sunday in this section shall be construed to embrace only that portion of the day between sunrise and sunset; and that trains in transitu, having started on Saturday, may, in order to reach the terminus or shops run until nine o'clock a. m. on Sunday, but not later, nor for any other purpose than to reach the terminus or shops.

Code, s. 1793; 1897, c. 126; 1879, cc. 97, 203.

XLI. TELEGRAPH AND TELEPHONE.

3780. Lines, interfering with. If any person shall unnecessarily disconnect the wire or in any other way render any telephone line or any part of any such line unfit for use in transmitting messages, or shall unnecessarily cut, tear down, or destroy, or in any way render unfit for the transmission of messages any part of the wire of

a telephone line, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned in the discretion of the court for a term not exceeding two years.

1901, c. 318.

3781. Message; obtaining knowledge of contents. If any person wrongfully obtain, or attempt to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company; or, being such clerk, operator, messenger, or other employee, wilfully divulge to any but the persons for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or wilfully refuses or neglects duly to transmit or deliver the same, he shall be guilty of a misdemeanor.

1889, c. 41, s. 1.

3782. Telephone message, obtaining knowledge of. If any person wrongfully obtain, or attempt to obtain, any knowledge of a telephonic message by connivance with a clerk, operator, messenger or other employee of a telephone company; or, being such clerk, operator, messenger or other employee, wilfully divulges to any but the persons for whom it was intended, the contents of a telephonic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court.

1903, c. 599.

3783. Poles and wires, injury to. If any person shall wilfully injure, or destroy, or pull down any telegraph or telephone pole, wire, insulator or any other fixture or apparatus attached to a telegraph or telephone line, he shall be guilty of a misdemeanor, and fined and imprisoned at the discretion of the court.

Code, s. 1118; 1881, c. 4; 1883, c. 103.

3784. Trees, felling, on wires. If any person shall negligently and carelessly cut or fell any tree or any limb or branch therefrom in such a manner as to cause the same to fall upon and across any telephone wire or electric light wire, and from which any injury to such wire shall be occasioned, he shall be guilty of a misdemeanor, and shall also be liable to a penalty of fifty dollars for each and every offense.

1903, c. 616.

XLII. TRADEMARKS.

3785. Forgery and counterfeiting; selling goods with counterfeit marks. If any person shall vend any goods, wares or merchandise having thereon any forged or counterfeited marks, tokens, stamps or labels purporting to be the marks, tokens, stamps or labels of any person being a resident of the United States, knowing the same at the time of the purchase thereof by him to be forged or counterfeited, he shall be guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both fine and imprisonment at the discretion of the court.

Code, s. 1039; 1870-1, c. 253, s. 2.

3786. Forgery and counterfeiting; fraudulent use of brands. If any person shall knowingly use the mark or brand of any other person on any sack, or shall knowingly impress on any sack the mark or brand of another person, with intent to defraud or for the purpose of enhancing the value of his own property, the person so offending shall be guilty of a misdemeanor, and punished as if convicted of larceny.

Code, s. 1040; 1874-5, c. 225.

3787. Private marks, stamps, labels. If any person shall knowingly and wilfully forge, or counterfeit or cause or procure to be forged or counterfeited, the private marks, tokens, stamps or labels of any mechanic, manufacturer or other person, being a resident of the United States, with intent to deceive and defraud the purchasers, mechanics or manufacturers of any goods, wares or merchandise whatsoever, upon conviction thereof, he shall be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment of not less than thirty days or more than five years, or both fine and imprisonment, at the discretion of the court.

Code, s. 1038; 1870-1, c. 253, s. 1.

3788. Larceny of branded timber. If any person shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark is stamped, branded or otherwise impressed, or shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark has been intentionally and without lawful authority removed, defaced or destroyed, he shall be deemed guilty of larceny thereof and punished as in other cases of larceny.

1903, c. 261, s. 5.

3789. Timber trademark, use of. If any person shall use or attempt to use any timber trademark without the written consent of the proprietor thereof, or falsely and fraudulently place any trademark on timber not the property of the owner of such trademark without his written consent, or intentionally and without lawful authority remove, deface or destroy any timber trademark or the imprint thereof on any timber or intentionally put any such timber in such a position, or place so remote from the stream from which it was taken, or on which it was afloat as to render it inconvenient or unnecessarily expensive to replace the same in such stream, he shall be guilty of a misdemeanor.

1903, c. 261, ss. 3, 4, 5.

3790. Timber mark, altering. If any person shall wilfully change, alter, erase or destroy any registered timber mark or brand put or cut upon any logs, timber, lumber or boards, except by the consent of the owner thereof, with intent to steal the said logs or timber, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both; if the same shall have been done with a felonious intent, such person shall be guilty of larceny and punished as for that offense.

1889, c. 142, s. 3; 1903, c. 41.

3791. Timber mark, taking possession of logs bearing. If any person shall knowingly and wilfully take up or have in his possession any log, timber, lumber or board upon which a registered timber mark or brand has been put or cut, except by the consent of the owner thereof, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both.

1889, c. 142, s. 4; 1903, c. 42.

XLIII. WATERSHEDS.

3792. Inspection of. When waterworks are owned and operated by any city or town, failure on the part of the municipal officials having in charge the management of the waterworks to comply with the law requiring sanitary inspection of watersheds shall be a misdemeanor and punished by a fine of not less than ten nor more than twenty-five dollars or by imprisonment for not less than ten nor more than thirty days: Provided, the said official do not prove to the satisfaction of the court that in spite of reasonable effort and diligence on his part he was prevented directly or indirectly by his superiors from doing his duty in this respect, in which case said superior officer shall be deemed guilty of a misdemeanor and

punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment for not less than one nor more than six months.

1899, c. 670, s. 4.

3793. Disobeying instructions. If any person residing on or owning property on a watershed of any stream from which public drinking water is obtained shall fail to comply with the provisions of the law for protection of such water supply, he shall be guilty of a misdemeanor, and punished by a fine of not less than two dollars nor more than twenty-five dollars, or by imprisonment for not less than ten nor more than thirty days.

1903, c. 159, s. 7.

3794. Polluting. If any person shall defile, corrupt or pollute any well, spring, drain, branch, brook or creek, or other source of public water supply used for drinking purposes, in any manner, or deposit the body of any dead animal on the watershed of any such water supply, or allow the same to remain thereon unless the same is buried with at least two feet cover, he shall be guilty of a misdemeanor, and fined and imprisoned, in the discretion of the court.

1903, c. 159, s. 11.

3795. Depositing human excreta on. If any person shall collect and deposit human excreta on the watershed of any public water supply he shall be guilty of a misdemeanor, and punished by fine and imprisonment, in the discretion of the court.

1903, c. 159, s. 12.

3796. Discharging sewerage into certain streams. If any person, firm, corporation or other officer of any municipality having a sewerage system in charge shall violate the provision of law relating to discharging sewerage into streams from which public drinking water is taken he shall be guilty of a misdemeanor.

1903, c. 159, s. 13.

3797. Failure to provide system for protection of watershed. If any person or municipality shall violate the provisions of law for protecting watersheds by failing to provide tub system for human excrement, as required by law, he shall be guilty of a misdemeanor, and fined or imprisoned, in the discretion of the court.

1903, c. 159, s. 14.

NOTE. For crimes relating to fishing, etc., see ss. 2698, 2699, 2715, 2729.

For crimes relating to terrapin, see s. 2381.

For crimes relating to oysters, see ss. 2397, 2400, 2402, 2406, 2413.

CAPTIONS.

| | Sections. |
|---|-----------|
| ADMINISTRATION, | 1—171 |
| I. NECESSITY FOR, | 1—2 |
| Penalty; what family may use, | 1 |
| Executor de son tort, | 2 |
| II. To WHOM GRANTED, | 3—13 |
| Order in which persons entitled, | 3 |
| Husband, on wife's estate; his interest therein. | 4 |
| Disqualifications, | 5 |
| When disqualified persons entitled. | 6 |
| Forfeiture by divorce or murder, | 7 |
| Elopement and adultery of wife forfeits right, | 8 |
| How husband forfeits right as to wife's estate, | 9 |
| Executor may renounce, | 10 |
| When renunciation required, | 11 |
| When person entitled deemed to have renounced, | 12 |
| When executor deemed to have renounced, | 13 |
| III. WILL ANNEXED, | 14—15 |
| Letters with. issued when, | 14 |
| Qualification of administrators with, | 15 |
| IV. JURISDICTION, | 16—17 |
| Of clerk of superior court, | 16 |
| What clerk has exclusive, | 17 |
| V. PUBLIC ADMINISTRATOR, | 18—21 |
| How appointed, | 18 |
| Takes and subscribes oath; gives bond, | 19 |
| When letters issue, | 20 |
| Powers; duties; when term expires, | 21 |
| VI. COLLECTORS, | 22—25 |
| When and how appointed, | 22 |
| Qualification; bond, | 23 |
| Authority, | 24 |
| Authority ceases. when; duty to account, | 25 |
| VII. APPLICATION FOR LETTERS, | 26—36 |
| What to contain, | 26 |
| How contest over, instituted, | 27 |
| Executor gives bond, when, | 28 |
| Oath taken; bond given, | 29 |
| Persons injured may sue on bond, | 30 |
| Letters revoked. bond liable to successor for default, | 31 |
| When new bond or new sureties required, | 32 |
| Remedy of surety in danger of loss, | 33 |
| Failing to give new bond, letters revoked, | 34 |
| Letters revoked; successor appointed; estate protected, | 35 |
| Form of letters, | 36 |
| VIII. REVOCATION, | 37—38 |
| On proof of will, | 37 |
| For disqualification or default, | 38 |
| IX. ADVERTISEMENT FOR CREDITORS, | 39—41 |
| Advertisement for claims, when and how made; cost, | 39 |
| How proved, | 40 |
| Notice may be served on creditor personally, | 41 |

CAPTIONS.

ADMINISTRATION—Continued.

| | Sections. |
|---|--------------|
| X. INVENTORY, | 42—44 |
| Taken and returned within three months, | 42 |
| How compelled, | 43 |
| How assets inventoried, | 44 |
| XI. WHAT ARE ASSETS, | 45—58 |
| Distinction between legal and equitable abolished, | 45 |
| Trust estate in personalty, | 46 |
| Crops ungathered at death, | 47 |
| What proceeds of real estate deemed personal assets, | 48 |
| What proceeds of real estate deemed real assets, | 49 |
| Personalty fraudulently conveyed recovered, | 50 |
| Debt of executor not discharged by appointment, | 51 |
| Heirs jointly liable for debts, when, | 52 |
| Limit of liability of heir, | 53 |
| Recovery apportioned among heirs, | 54 |
| Priority of debts as affecting liability of heir, | 55 |
| Defense, other debts of equality or priority, | 56 |
| Debts paid, estimated as unpaid in suit against heir, when, | 57 |
| Contribution among devisees, where heir is liable, | 58 |
| XII. WRONGFUL DEATH, | 59—60 |
| Action for wrongful death; recovery not assets, | 59 |
| Measure of damages in wrongful death, | 60 |
| XIII. SALES OF PERSONALTY, | 61—67 |
| By collector, only on order of court, | 61 |
| As soon as practicable, | 62 |
| Public, how made, | 63 |
| Private, how made, | 64 |
| On credit; how proceeds secured, | 65 |
| Public, hours of; penalty, | 66 |
| Evidences of debt, when and how sold, | 67 |
| XIV. SALES OF REALTY, | 68—85 |
| To pay debts when personalty insufficient, | 68 |
| Undevised first sold, | 69 |
| Conveyances by heir within two years of letters, | 70 |
| Conveyed in fraud of creditors, | 71 |
| Fraudulent grantee selling innocent purchaser, liable, | 72 |
| Heirs and devisees necessary parties to proceeding, | 73 |
| Infants defend by guardian; must answer, | 74 |
| Adverse claimant may be heard, | 75 |
| What petition for, must show, | 76 |
| Issue joined, cause transferred to term, | 77 |
| Petition not denied, order made, | 78 |
| What order contains; what title made, | 79 |
| How advertised, | 80 |
| Lands devised to be sold by executor, who may sell, | 81 |
| Land sold by decedent; who makes deed, | 82 |
| Under will, may be public or private, | 83 |
| Realty bought for estate, when, | 84 |
| Specifically devised, devisee entitled to contribution, | 85 |
| XV. DEBTS, PROVED AND PAID, | 86—97 |
| Order of payment, | 86 |
| No preference in the class, | 87 |
| Debts due executor not preferred, | 88 |
| Debts not due, how paid, | 89 |
| Affidavit as to debt may be required, | 90 |
| Disputed debt may be referred, | 91 |
| Disputed debt not referred, barred in six months, | 92 |
| Claims not presented in twelve months, admr. not liable, | 93 |
| No lien by suit against representative, | 94 |

CAPTIONS.

| ADMINISTRATION— <i>Continued.</i> | Sections. |
|---|-----------|
| Payment of debts out of class, when valid, | 95 |
| Costs against executors, when allowed, | 96 |
| Bonds which bind heir, | 97 |
| XVI. ACCOUNTS, | 98—101 |
| Annual, | 98 |
| Failure to file, how compelled, | 99 |
| Vouchers presumptive evidence, | 100 |
| Final account, | 101 |
| XVII. ACCOUNTING COMPELLED, | 102—129 |
| By special proceeding by creditor, | 102 |
| What rules govern, | 103 |
| When and where summons returnable, | 104 |
| Clerk to advertise for creditors, when, | 105 |
| How advertisement published, | 106 |
| Creditors to file claims; appoint agent, | 107 |
| How claims proven, | 108 |
| Representative to file claims; notice to creditors, | 109 |
| Clerk to exhibit claims to representative, | 110 |
| Representative denying claim, notice to creditor, | 111 |
| Issues joined, cause docketed for hearing, | 112 |
| Costs paid by representative personally, when, | 113 |
| Representative failing to appear, procedure, | 114 |
| Clerk to state an account, | 115 |
| Account stated; examined; excepted to; signed, | 116 |
| Either party may appeal; security given for costs, | 117 |
| Papers filed; cause docketed for trial, | 118 |
| Certain creditors may docket judgments, when, | 119 |
| Judgment, if assets sufficient to pay a class, | 120 |
| Judgment, if assets insufficient to pay a class, | 121 |
| What judgment contains; execution, | 122 |
| When judgment to fix with assets, | 123 |
| Form and effect of execution, | 124 |
| Report evidence of assets only as of its date, | 125 |
| Assets subsequent to report, how shown, | 126 |
| Suit for accounting or debt brought to term, | 127 |
| Personal assets insufficient, land proceeded against, | 128 |
| Proceedings to sell real estate, how conducted, | 129 |
| XVIII. DISTRIBUTION, | 130—135 |
| Order of distribution, | 130 |
| Advancements accounted for, | 131 |
| Children advanced to render schedule, | 132 |
| Children refusing to account for advances not to share, | 133 |
| Illegitimate children next of kin to mother, | 134 |
| Illegitimate children next of kin to each other, | 135 |
| XIX. AFTER-BORN CHILDREN, | 136—141 |
| Share in realty, in what allotted, | 136 |
| Share in personalty, in what allotted, | 137 |
| Share in personalty, when allotted in proceeds of realty, | 138 |
| Decree of contribution for share in realty, effect of, | 139 |
| When deemed legatee or devisee, | 140 |
| If no petition filed, how estate settled, | 141 |
| XX. SETTLEMENT, | 142—153 |
| Legacies and distributive shares, how recovered, | 142 |
| Distributive shares paid to clerk, when, | 143 |
| Clerk to give receipt under seal, | 144 |
| Must be made at end of two years, | 145 |
| What may be retained, | 146 |
| Commissions allowed; proviso, | 147 |
| Petition may be filed for, | 148 |

CAPTIONS.

| ADMINISTRATION— <i>Continued.</i> | Sections. |
|---|-----------|
| Fund due absent party or infant without guardian paid to court; party not heard of in seven years, procedure, | 149 |
| Liability and compensation of clerk, | 150 |
| When paid to university, | 151 |
| Who parties to proceeding for settlement, | 152 |
| Legacies ordered paid within two years, when, | 153 |
| XXI. ACTIONS BY AND AGAINST, | 154—163 |
| Right of action survives to, and against, | 154 |
| Actions which do not survive, | 155 |
| Right of action survives to successor, | 156 |
| May maintain any appropriate action to recover assets, | 157 |
| Must be in representative capacity, | 158 |
| Appearance by or service on one, binds all, | 159 |
| Action against, when; execution issues, how, | 160 |
| Service by publication, when, | 161 |
| Successor may issue execution, when, | 162 |
| Letters revoked, action continues, | 163 |
| XXII. MISCELLANEOUS PROVISIONS, | 164—171 |
| How personal representatives hold, | 164 |
| Personal representatives liable, | 165 |
| Bona fide administration under act of 1868-9 validated, | 166 |
| Time in which act to be done may be extended, | 167 |
| Powers under will not affected; proviso, | 168 |
| Causes transferred to superior court, when, | 169 |
| Estates prior to certain dates, | 170 |
| To what estates this chapter applicable, | 171 |
| ADOPTION OF MINOR CHILDREN, | 172—179 |
| Petition filed before clerk, what to contain, | 172 |
| Parties to proceeding, | 173 |
| Letters of, when granted, | 174 |
| Effect of order; child to inherit, when; name changed, | 175 |
| Bond to secure orphan's property, | 176 |
| Clerk to record order; revocation, | 177 |
| Right to custody forfeited by abandonment, | 178 |
| Restoration of rights and privileges, | 179 |
| ALIENS, | 180—181 |
| May take and hold lands, | 180 |
| Prior contracts validated, | 181 |
| APPRENTICES, | 182—204 |
| I. POWER OF CLERK, | 182—187 |
| To apprentice, or send to orphanage, | 182 |
| To determine incapacity, desertion or drunkenness, | 183 |
| Must examine persons as to circumstances; tradesmen of useful art preferred, | 184 |
| May modify; discharge apprentice and re-apprentice, | 185 |
| May direct disposition of wages, | 186 |
| Guardian to be appointed when \$100 in clerk's hands, | 187 |
| II. THE APPRENTICE, | 188—191 |
| Who may be apprenticed, | 188 |
| May make complaint of ill-usage, violation of indenture; duty of clerk, | 189 |
| Compelled to serve, | 190 |
| Person enticing away apprentice, penalty, | 191 |
| III. THE EMPLOYER, | 192—194 |
| Shall provide, what, | 192 |
| Annual report made by, to clerk, | 193 |

CAPTIONS.

| | |
|--|-----------|
| APPRENTICES— <i>Continued.</i> | Sections. |
| Shall not remove apprentice from state; indenture cancelled, when, | 194 |
| IV. THE INDENTURE, | 195—198 |
| In name of clerk and employer, | 195 |
| For what time apprenticed, | 196 |
| Relator in action on indenture; limitations, | 197 |
| Indentures to be recorded by register of deeds, | 198 |
| V. TO LEARN A TRADE, | 199—204 |
| Who may be apprenticed, | 199 |
| Apprentices over fourteen to sign indenture, | 200 |
| Orphan asylum may execute indentures, | 201 |
| What indenture to contain, | 202 |
| Apprentice compelled to serve, how, | 203 |
| Employer failing to teach apprentice liable for damages and a penalty, | 204 |
| ATTORNEYS AT LAW, | 205—214 |
| I. HOW LICENSED, | 205—208 |
| Examination, | 205 |
| Conditions precedent to examination, | 206 |
| Oath taken in open court, | 207 |
| Persons disqualified, | 208 |
| II. DEBARRED, | 209—210 |
| For crime, | 209 |
| Failure to account to client, | 210 |
| III. RELATION TO CLIENT, | 211—213 |
| Authority filed or produced if requested, | 211 |
| Failure to file complaint makes, liable for costs, | 212 |
| Fraud renders liable for double damages, | 213 |
| IV. ARGUMENTS, | 214 |
| Control of, by court, | 214 |
| AUCTIONEERS, | 215—219 |
| How appointed, | 215 |
| Duties; semi-annual accounts, | 216 |
| Penalty, acting without appointment, | 217 |
| To sales of what articles applicable, | 218 |
| Commissions; pay one per cent. to town. | 219 |
| BASTARDY, | 220—231 |
| Justices have jurisdiction; warrant issued only on complaint of woman or county commissioner, | 220 |
| Procedure on complaint by county commissioner, | 221 |
| Procedure when woman declares father, | 222 |
| Procedure on appeal, | 223 |
| Putative father out of county, | 223a |
| Upon appeal parties and witnesses recognized, | 224 |
| Case may be continued till birth of child, | 225 |
| Fine, allowance and bond, | 226 |
| Action barred in three years after birth, | 227 |
| Execution may issue for maintenance, | 228 |
| Putative father when committed or apprenticed, | 229 |
| Procedure for legitimating bastards, | 230 |
| Effects of legitimation, | 231 |
| BONDS, | 232—287 |
| I. MORTGAGE IN LIEU OF, | 232—237 |
| Fiduciary or official, | 232 |
| Appearance; security for costs or fine, | 233 |

CAPTIONS.

BONDS—Continued.

| | Sections. |
|---|-----------|
| Clerk superior court; depository of, | 234 |
| Prosecution, | 235 |
| Affidavit of value of property required, | 236 |
| Additional security required, when, | 237 |
| II. IN SURETY COMPANIES, | 238—243 |
| By state officers, | 238 |
| Mutual officers; fiduciaries; litigants, etc., | 239 |
| How released from liability, | 240 |
| Estoppel to plead ultra vires; penalty failure to pay judgment, | 241 |
| When accepted and officer inducted, | 242 |
| Expense of fiduciary bond charged to fund, | 243 |
| III. OFFICER ACTING WITHOUT, | 245 |
| Penalty for, | 245 |
| IV. IRREGULARITY, | 246 |
| Informal taking, not to invalidate. | 246 |
| V. ACTIONS ON, | 247—252 |
| Take in judicial proceedings brought in name of state, | 247 |
| Official bonds, relator; successive suits, | 248 |
| Complaint must show party in interest; may sue officer indi- | |
| vidually, | 249 |
| Summary remedy on official bond, | 250 |
| Damages against officers for money unlawfully detained, | 251 |
| Evidence against principal admissible against sureties, | 251a |
| Officer liable for the debt, when, | 252 |
| VI. STATE OFFICERS, | 253—258 |
| Secretary of state, | 253 |
| Treasurer, | 254 |
| Treasurer's clerks, | 254a |
| Clerk of supreme court. bond and oath of office, | 255 |
| Keeper of capitol; penalty; when renewed; where deposited. | 256 |
| Public printer, | 257 |
| Insurance commissioner, | 257a |
| Paymaster of state troops, | 258 |
| VII. COUNTY OFFICERS, | 259—269 |
| Clerk of superior court, | 259 |
| Clerk's bond. how approved; where deposited, | 260 |
| County treasurer; penalty; when renewed, | 261 |
| Sheriffs; number; penalty; form, | 262 |
| Coroners; penalty; oath of office, | 263 |
| Coroners' bonds registered, | 264 |
| Register of deeds. | 265 |
| Constable; where registered; fees. how paid, | 266 |
| County surveyor, | 267 |
| Entry taker, | 268 |
| Wreck commissioner, | 268a |
| Standard keeper, | 269 |
| VIII. PILOTS, | 270 |
| Pilots; may be enlarged; where filed, | 270 |
| IX. DUTY OF COUNTY COMMISSIONERS. | 271—278 |
| County officials to renew bonds annually, | 271 |
| Tenure of bond; examined annually; when increased. | 271a |
| Vacancy declared on failure to renew bond, | 272 |
| Justification of surety on official, | 273 |
| County commissioners to approve bonds; custody; how acknowl- | |
| edged, | 274 |
| Clerk of board to record yeas and nays on approval; penalty | |
| for failure, | 275 |
| Commissioner liable as surety, when, | 276 |

CAPTIONS.

| | |
|---|-----------|
| BONDS— <i>Continued.</i> | Sections. |
| Record of board conclusive evidence of facts stated therein on prosecution, | 277 |
| Commissioners can not be sureties, where they may approve, | 278 |
| X. DUTY SUPERIOR COURT JUDGE, | 279—281 |
| Official bond insufficient, new one required; office vacated for failure; successor appointed, | 279 |
| Appointee to give bond; official bonds, liabilities, | 280 |
| Judge to file statement of proceedings with commissioners, | 281 |
| XI. FIDUCIARIES, | 282—287 |
| Executors, administrators or collectors; penalty; condition, | 282 |
| Public administrator, | 283 |
| Public guardian, | 284 |
| Public guardian's bond enlarged, | 285 |
| Guardians to give bond; condition, | 286 |
| Guardian to renew bond every three years, | 287 |
| BOUNDARIES, | 288—289 |
| May be established by special proceeding, | 288 |
| Procedure for establishing, | 289 |
| BURNT AND LOST RECORDS, | 290—307 |
| Certified copies of destroyed records received in evidence, | 290 |
| Original papers may be again recorded; survey may be made by petition before clerk, | 291 |
| Copies of lost wills may be admitted to probate, | 292 |
| Certified copy of will evidence; letters testamentary granted, | 293 |
| Contents of destroyed will proved on petition before clerk, | 294 |
| Destroyed judgments and proceedings perpetuated by petition in court having original jurisdiction, | 295 |
| Color of title, how determined, | 296 |
| Action on destroyed official bonds, | 297 |
| Witness tickets destroyed, others filed, | 298 |
| Lost conveyances, how replaced, | 299 |
| Records of courts admissible to prove contents of deeds, wills, etc., | 300 |
| Copies of deeds, etc., mentioned in preceding section may be registered, | 301 |
| Rules for petitions under this chapter, | 302 |
| Records allowed under this chapter have same effect as original, | 303 |
| Recitals of decrees, records, etc., in deeds executed prior to destruction thereof prima facie evidence of existence, | 304 |
| Deed prima facie evidence of records recited therein, | 305 |
| Provisions of this chapter extend to what records, etc., | 306 |
| Certain records in Moore county presumed to have been burned, | 307 |
| CIVIL PROCEDURE. | 308—842 |
| I. DEFINITIONS, | 308—314 |
| Remedies, | 308 |
| Actions, | 309 |
| Special proceedings, | 310 |
| Kinds of actions, | 311 |
| Criminal action, | 312 |
| Civil action, | 313 |
| Court means clerk, when, | 314 |
| II. GENERAL PROVISIONS, | 315—320 |
| Remedies not merged, | 315 |
| One form of action, | 316 |
| Parties known as plaintiff and defendant, | 317 |
| How party may appear, | 318 |

CAPTIONS.

CIVIL PROCEDURE—*Continued.*

| | Sections. |
|---|-----------|
| Feigned issues abolished, | 319 |
| Jurisdiction of clerk on procedure, | 320 |
| III. LIMITATIONS, GENERAL PROVISIONS. | 321—341 |
| When action commenced, | 321 |
| Run from cause of action accrued; objection taken by answer, | 322 |
| Deemed pleaded by insane party, | 323 |
| Disabilities, | 324 |
| Disability of marriage. | 325 |
| Cumulative disabilities. | 326 |
| Disability must exist when right of action accrues, | 327 |
| Defendant out of state; action begun, judgment enforced, when, | 328 |
| Death before limitation expires; action by or against executor, | 329 |
| when, | 329 |
| Time of stay by injunction or prohibition, | 330 |
| Time during controversy on probate of will or granting letters, | 331 |
| New action within one year after nonsuit, etc., | 332 |
| New promise must be in writing, | 333 |
| Admission by partner after dissolution, effect. | 334 |
| Undisclosed partner. | 335 |
| Cotenants; part barred, when, | 336 |
| Applicable to actions by state, | 337 |
| Action on account current, | 338 |
| Not applicable to bank bills, | 339 |
| Actions against bank officers and stockholders, | 340 |
| Aliens in time of war, | 341 |
| IV. LIMITATIONS, REAL PROPERTY, | 342—351 |
| Title against state, | 342 |
| Such possession valid against claimants under state, | 343 |
| Seven years' possession under color, | 344 |
| Seizin within twenty years, when necessary, | 345 |
| Twenty years' adverse possession, | 346 |
| Action after entry, | 347 |
| Possession follows legal title, when, | 348 |
| Tenant's possession in landlord's, | 349 |
| No title by possession of right of way. | 350 |
| No title by possession of streets and highways. | 351 |
| V. LIMITATIONS, OTHER THAN REAL PROPERTY. | 352—361 |
| Periods prescribed. | 352 |
| Ten years, | 353 |
| Seven years, | 354 |
| Six years, | 355 |
| Five years, | 356 |
| Three years, | 357 |
| Two years, | 358 |
| One year, | 359 |
| Six months, | 360 |
| All other actions, ten years. | 361 |
| VI. PARTIES, | 362—378 |
| Real party in interest; actions by assignees. | 362 |
| Who may sue for penalties. | 362a |
| Suits for penalties brought in name of state, | 362b |
| Actions by purchaser under judicial sale, | 363 |
| Action by executor or trustee. | 364 |
| Infants, etc., sue by guardian or next friend, | 365 |
| Infants, etc., defend by guardian ad litem, | 366 |
| Guardian ad litem to file answer. | 367 |
| Married women, | 368 |
| Who may be plaintiffs. | 369 |
| Who may be defendants. | 370 |
| Several parties, how classed: action by one for a class, | 371 |

CAPTIONS.

| CIVIL PROCEDURE— <i>Continued.</i> | Sections. |
|---|----------------|
| Persons severally liable, suit against, | 372 |
| Persons jointly liable, suits against, | 373 |
| New parties by order of court; interpleader, | 374 |
| Abatement of actions, | 375 |
| Death of party suggested before clerk, | 376 |
| Clerk to summon party succeeding to rights or liabilities; answer, | 377 |
| Clerk to notify party succeeding to rights of deceased plaintiff, | 378 |
| VII. VENUE, | 380—389 |
| Place of subject of action, | 380 |
| Where cause of action arose, | 381 |
| Official bonds, executors and administrators, | 382 |
| Domestic corporations, | 383 |
| Foreign corporations, | 384 |
| Where plaintiff or defendant resides; where neither is resident, | 385 |
| Change of, | 386 |
| Removal for fair trial, | 387 |
| Affidavits and counter affidavits; shall remove, when, | 388 |
| Transcript on removal; subsequent proceedings, | 389 |
| VIII. SUMMONS, | 390—410 |
| Civil actions commenced by, | 390 |
| What to contain; where returnable, | 391 |
| When attested by seal, | 392 |
| Issued to several counties, | 393 |
| When officer shall execute and return, | 394 |
| When issued within ten days of term, | 395 |
| Issued more than, served within, ten days of term, | 396 |
| When summons returned to second term, | 397 |
| Alias and pluries, | 398 |
| Discontinuance, | 399 |
| Served by reading, | 400 |
| Served by copy; corporations; infants; persons non compos, | 401 |
| Irregular service on infants, etc., validated, | 402 |
| Served by publication, | 403 |
| Manner of publication, | 404 |
| When service complete, | 405 |
| Jurisdiction acquired from service, | 406 |
| Proof of service, | 407 |
| Voluntary appearance by defendant, | 408 |
| Personal service on nonresident, | 409 |
| Defense after judgment on substituted service, | 410 |
| IX. PROSECUTION BONDS, | 411—415 |
| Plaintiff's, for costs, | 411 |
| Suit as a pauper, | 412 |
| Court may assign counsel, | 413 |
| Defendant's, for costs and damages in actions for land, | 414 |
| Defense without bond, when, | 415 |
| X. JOINT AND SEVERAL DEBTORS, | 416—420 |
| When some only of defendants are served; partners, | 416 |
| Summoned after judgment, when, | 417 |
| Defense by party summoned after judgment, | 418 |
| Pleadings and proceedings same as in action, | 419 |
| Pleadings verified as in actions, | 420 |
| XI. LIS PENDENS, | 421—425 |
| Notice of, filed in county where land lies, | 421 |
| Notice ineffectual unless action is prosecuted, | 422 |
| Effect of, on subsequent purchasers, | 423 |
| Notice cancelled, when and how, | 424 |
| Lis pendens in Buncombe, | 425 |

CAPTIONS.

CIVIL PROCEDURE—Continued.

| | Sections. |
|---|-----------|
| XII. COMPLAINT, | 426—430 |
| The first pleading, | 426 |
| Time of filing, | 427 |
| Contents, | 428 |
| In action to recover purchase money of land, | 429 |
| What causes of action may be joined. | 430 |
| XIII. DEFENDANT'S PLEADINGS, | 431—434 |
| Demurrer or answer, | 431 |
| Demurrer and answer, | 432 |
| Sham and irrelevant defenses, | 433 |
| Time for, | 434 |
| XIV. DEMURRER, | 435—439 |
| Grounds for, | 435 |
| Must specify grounds of objection, | 436 |
| Sustained for misjoinder, action divided, | 437 |
| Objection not appearing in complaint, | 438 |
| Objection waived, | 439 |
| XV. ANSWER, | 440—444 |
| Contains what, | 440 |
| Debt for purchase money of land denied, | 441 |
| Counterclaim, | 442 |
| Several defenses, | 443 |
| Contributory negligence pleaded and proved, | 444 |
| XVI. REPLY, | 445—447 |
| When filed; cause at issue, | 445 |
| What to contain; demurrer to answer, | 446 |
| Demurrer to reply, | 447 |
| XVII. PLEADING, GENERAL PROVISIONS, | 448—465 |
| Forms of, | 448 |
| Subscribed; verified, when, | 449 |
| Verification, | 450 |
| Verification by agent or attorney, | 451 |
| Verification by corporation; when state is party, | 452 |
| Verification before what officer, | 453 |
| Verification omitted, when; pleadings incompetent in criminal prosecutions, | 454 |
| Items of account; particulars furnished, when, | 455 |
| Pleadings construed, | 456 |
| Irrelevant, redundant; indefinite, uncertain, | 457 |
| Judgments, pleaded; burden of proof, | 458 |
| Conditions precedent pleaded; burden of proof, | 459 |
| Instrument for payment of money pleaded, | 460 |
| Private statutes pleaded, | 461 |
| Libel and slander, complaint; onus, | 462 |
| Libel and slander, answer, | 463 |
| Allegations not denied, deemed true, | 464 |
| Pleadings lost, copy used, | 465 |
| XVIII. AMENDMENTS, | 466—475 |
| As of course, when, | 466 |
| Upon demurrer sustained, | 467 |
| To pleadings, process or proceeding, when, | 468 |
| Effect of substantial, | 469 |
| Unsubstantial defects disregarded, | 470 |
| When plaintiff ignorant of defendant's name; true name inserted when known, | 471 |
| Supplemental pleadings, | 472 |
| Time for pleading enlarged; proceedings made conformable to law, | 473 |

CAPTIONS.

| CIVIL PROCEDURE— <i>Continued.</i> | Sections. |
|---|----------------|
| Mistake, surprise, excusable neglect, | 474 |
| Orders without notice, vacated, | 475 |
| XIX. VARIANCE BETWEEN PLEADING AND PROOF, | 476—478 |
| Material; amendment when, | 476 |
| Immaterial, | 477 |
| Failure of proof, | 478 |
| XX. REFERENCE, | 479—486 |
| By consent, | 479 |
| Compulsory, | 480 |
| Referees, how chosen; qualifications, | 481 |
| Referees may administer oaths, | 482 |
| Conduct of trial; amendments; contempt punished, | 483 |
| Testimony reduced to writing, | 484 |
| Report, when and to whom made; review of; judgment on, | 485 |
| Report, what to contain; exceptions; effect of special verdict, when, | 486 |
| XXI. TRIAL, | 487—503 |
| Defined, | 487 |
| How issue tried, | 488 |
| Of issues of fact, | 489 |
| Continuance before term; affidavit for, | 490 |
| Continuance in term, | 491 |
| Counter affidavits as to continuance, | 492 |
| Order of business, | 493 |
| Separate trials, when, | 494 |
| Judge to explain law; express no opinion on facts, | 495 |
| Instructions in writing, when, | 496 |
| Written instructions in jury room, when, | 497 |
| Requests for instructions, | 498 |
| Demurrer to evidence, | 499 |
| Jury trial waived, how, | 500 |
| Findings of fact and conclusions of law by judge, | 501 |
| Exceptions, when and how taken, | 502 |
| Proceedings upon judgment on issue of law, | 503 |
| XXII. ISSUES, | 504—509 |
| Defined, | 504 |
| Of law, | 505 |
| Of fact, | 506 |
| Which to be first tried, | 507 |
| When and by whom made up, | 508 |
| Form, | 509 |
| XXIII. VERDICT, | 510—514 |
| General and special, | 510 |
| Character of, for different actions, | 511 |
| Special controls general, | 512 |
| Jury to assess damages, when; counterclaim, | 513 |
| Entry of; motion for new trial; exceptions, when and how taken, | 514 |
| XXIV. JUDGMENT, | 515—539 |
| Defined, | 515 |
| By default final, when, | 516 |
| By default and inquiry, | 517 |
| By default for defendant, when, | 518 |
| Rendered in vacation, when, | 519 |
| On frivolous pleading, | 520 |
| Stands until reversed, | 521 |
| Applicable to justice's courts, | 522 |
| For whom and against whom given; failure to prosecute; married women, | 523 |

CAPTIONS.

CIVIL PROCEDURE—*Continued.*

| | Sections. |
|--|-----------|
| How entered, party dying after verdict, | 524 |
| Limited by demand in complaint, when, | 525 |
| Legal title with covenants passed by, when, | 526 |
| Regarded as a deed and registered, when, | 527 |
| How registered, | 528 |
| Certified registered copy evidence, | 529 |
| In action for recovery of personal property, | 530 |
| What judge approves judgments, | 531 |
| Judgment roll, | 532 |
| Docketed and indexed; all of same term as of first day, | 533 |
| When and where and how docketed; lien, | 534 |
| Of supreme court docketed in superior court; lien; transcript, | 535 |
| Federal court judgments docketed; lien, | 536 |
| Judgment paid to clerk; docket credited; transcript to other counties, | 537 |
| Clerk to pay money to party entitled, | 538 |
| Credits upon judgments, | 539 |
| XXV. JUDGMENTS CONFESSED, | 540—542 |
| When and for what, | 540 |
| Debtor to make verified statement, | 541 |
| Judgment: costs; execution; when due by installments, | 542 |
| XXVI. APPEAL, | 543—572 |
| Writs of error abolished, | 543 |
| Certiorari, recordari and supersedeas, | 544 |
| Who may appeal, | 545 |
| In what cases taken, | 546 |
| From judge in special proceedings, | 547 |
| Interlocutory orders reviewed on appeal from judgment, | 548 |
| When taken; execution stayed, when, | 549 |
| Entered on docket; case on appeal, how stated and settled; penalty on judge failing to settle, | 550 |
| Clerk to prepare transcript, | 551 |
| Undertaking on appeal; filed in supreme court, when, | 552 |
| Justification of sureties, | 553 |
| Undertaking to be filed with clerk, | 554 |
| Notice of motion to dismiss for irregularity; new bond or deposit, | 555 |
| Appeals in forma pauperis, | 556 |
| Undertaking to stay proceedings, money demand; perishable property sold, | 557 |
| Property deposited in court to stay proceedings, when, | 558 |
| Conveyance executed to stay proceedings, when, | 559 |
| Proceedings stayed in possessory action and foreclosure, how, | 560 |
| Extent of stay; security limited for fiduciaries, | 561 |
| Undertaking in one instrument or several; served on appellee, | 562 |
| Judgment not vacated by stay of proceedings, | 563 |
| Judgment on appeal and on undertakings; restitution, | 564 |
| Plaintiff's cost bond on appeal from justice, | 565 |
| Appeal from justice heard de novo; judgment by default, when; appeal dismissed, | 566 |
| Clerk to docket appeal from justice for trial de novo, | 567 |
| Appeal from justice heard on original papers, | 568 |
| Appeal from the clerk, | 569 |
| When taken; who may take, | 570 |
| Duty of clerk on appeal prayed, | 571 |
| Duty of judge on appeal, | 572 |
| XXVII. EXECUTION, | 573—598 |
| Judgment, enforced by, | 573 |
| Kinds of; signed by clerk; sealed, when, | 574 |
| Against married woman, | 575 |

CAPTIONS.

CIVIL PROCEDURE—*Continued.*

Sections.

| | |
|--|----------------|
| Clerk to issue in six weeks; alias; penalty, | 576 |
| Within three years as of course, | 577 |
| After three years, by leave obtained after notice, | 578 |
| Stay of, pending appeal, | 579 |
| To what counties issued; land sold where; title passed, | 580 |
| Issued from and returned to court of rendition, | 581 |
| When tested; to what term returnable, | 582 |
| Against the person, when, | 583 |
| Defendant dying in execution; new execution against property, | 584 |
| Form of execution, | 585 |
| Variance between judgment and, | 586 |
| What may be sold under, | 587 |
| Sale of trust estates, purchaser's title, | 588 |
| Sheriff's deed on sale of equity of redemption, | 589 |
| Growing crops exempted from, | 590 |
| Forthcoming bond for personal property, | 591 |
| Surety furnished list of property; possession his; sale in thirty days, | 592 |
| Summary remedy on forthcoming bond, | 593 |
| Returns of, entered on judgment docket: penalty for clerk's failure, | 594 |
| Cost of keeping horses, etc., | 595 |
| Verified account of expenses of keeping filed, | 596 |
| Purchaser of defective title; remedy against defendant, | 597 |
| Costs on execution paid to clerk; penalty, | 598 |
| XXVIII. EXECUTION SALES, | 599—609 |
| How advertised; cost of newspaper publication, | 599 |
| Notice of, served on defendant; on governor, when, | 600 |
| Sale days under, or by order of court, | 601 |
| Sales between ten and four o'clock, | 602 |
| Postponed from day to day, | 603 |
| Postponed more than six days validated, | 604 |
| Private acts regulating land sales, repealed, | 605 |
| Advertisement of sale of personal property, | 606 |
| Penalty for selling contrary to law, | 607 |
| No sale for want of bidders; officer's return; penalty, | 608 |
| Officer to prepare deeds for property sold, | 609 |
| XXIX. BETTERMENTS, | 610—624 |
| Petition by claimant; execution suspended; issues found, | 610 |
| Annual value of land and waste charged against defendant, | 611 |
| Damages and rental value limited to three years, when, | 612 |
| Value of improvements estimated, | 613 |
| Improvements to balance rents, | 614 |
| Verdict and judgment to be for difference, | 615 |
| Balance due defendant a lien, | 616 |
| Recovery by plaintiff from remainderman, betterments paid, | 617 |
| Not applicable to suit by mortgagee, | 618 |
| Value of premises without improvements, when, | 619 |
| How estimated, | 620 |
| Plaintiff's election that defendant take premises, | 621 |
| Payment made to court; land sold on default, | 622 |
| If plaintiff is feme covert, minor or insane, | 623 |
| Defendant evicted, recovery of plaintiff, | 624 |
| XXX. SUPPLEMENTAL PROCEEDINGS, | 625—642 |
| Execution returned unsatisfied, order within three years for debtor to answer, | 625 |
| Execution not returned, order on affidavit: proceedings, | 626 |
| Proceedings against joint debtors, | 627 |
| Either party may examine witnesses, | 628 |

CAPTIONS.

CIVIL PROCEDURE—Continued.

| | Sections. |
|---|-----------|
| Debtor leaving state, or concealing himself, arrested; held to bond, | 629 |
| Incriminating answers, no privilege; not used in criminal prosecutions, | 630 |
| Disposition of property forbidden, | 631 |
| Debtors of judgment debtor may pay off execution, | 632 |
| Debtors, and persons having property, of judgment debtor, summoned, | 633 |
| Party or witness examined under oath; certified; answer by corporation, | 634 |
| Where proceedings instituted and defendant examined, | 635 |
| Debtor's property ordered sold; exceptions, | 636 |
| Receiver appointed; creditors notified, | 637 |
| Order of appointment filed and recorded; property vests when; receiver under control of court, | 638 |
| Order of appointment recorded in county in which land lies and debtor resides, | 639 |
| Receiver to sue, debt denied, property claimed adversely; disposition forbidden, | 640 |
| Reference, when, | 641 |
| Disobedience of orders, contempt; punishment, | 642 |
| XXXI. PROPERTY EXEMPT FROM EXECUTION; ALLOTMENT, | 643—666 |
| When debt contracted or cause of action arose, | 643 |
| Sheriff to summon and swear appraisers: surveyor, when, | 644 |
| Duty of appraisers, | 645 |
| Return of appraisers; filed and registered; copy to county of execution; original or copy evidence, | 646 |
| Liability of officer or appraiser conspiring, | 647 |
| Re-allotment for increase of value; appeal; statute not exclusive, | 648 |
| Levy on excess; return of officer, | 649 |
| When no election by owner, appraisers elect, | 650 |
| Tracts not contiguous included, when, | 651 |
| Personal property not to exceed \$500 appraised on demand; manner; return, | 652 |
| Appraiser's oath and fees, | 653 |
| Appraisers to set apart selected property; return to register of deeds, | 654 |
| Return registered, | 655 |
| Exceptions to valuation and allotment; procedure, | 656 |
| When increase demanded; what jury shall find: commissioners appointed by court; report, | 657 |
| Undertaking of objector, | 658 |
| Set aside for fraud, complicity or irregularity, | 659 |
| Return registered; original or copy evidence, | 660 |
| Allotted upon petition of owner, | 661 |
| Advertisement of petition; time of hearing, | 662 |
| Exceptions, when allotted on petition, | 663 |
| Allotted after death of homesteader, | 664 |
| Liability of officer failing to allot, | 665 |
| Forms, | 666 |
| XXXII. SPECIAL PROCEEDINGS, | 667—682 |
| This chapter applicable to, | 667 |
| How commenced, | 668 |
| Summons in; what to contain, | 669 |
| Return of summons, | 670 |
| Complaint filed, when, | 671 |
| Nonsuit for failure to file in time, | 672 |
| Time enlarged, | 673 |
| Equitable defenses pleaded; transferred to civil issue docket; amendments, | 674 |

CAPTIONS.

| CIVIL PROCEDURE— <i>Continued.</i> | Sections. |
|---|-------------|
| Ex-parte; begun by petition, | 675 |
| Clerk hears summarily; attorney must file authority from nonresident, | 676 |
| Judge approves when infants are petitioners, | 677 |
| Ex-parte proceedings validated, | 678 |
| Orders signed by judge, | 679 |
| Reports of commissioners and jurors; confirmed, when, | 680 |
| No report set aside for trivial defect, | 681 |
| Commissioners to sell to settle in sixty days, | 682 |
| XXXIII. ARREST AND BAIL, | 683—714 |
| Arrested only as herein prescribed, | 683 |
| In what cases, | 684 |
| Who issues order, | 685 |
| Order obtained on affidavit, | 686 |
| Undertaking before order, | 687 |
| Time when order may issue; form, | 688 |
| Copy of affidavit and order to defendant, | 689 |
| Order, how executed, | 690 |
| Vacated unless served before judgment; time to move to vacate, | 691 |
| Motion by defendant to vacate order: jury trial, when, | 692 |
| Counter affidavits by plaintiff, when, | 693 |
| How defendant discharged, | 694 |
| Defendant's undertaking, | 695 |
| Defendant's undertaking delivered to clerk: plaintiff's exceptions, | 696 |
| Qualification of bail, | 697 |
| Notice of justification; new bail, | 698 |
| Justification of bail, | 699 |
| If bail sufficient, examination certified, sheriff exonerated, | 700 |
| Deposit in lieu of bail, | 701 |
| Deposit paid into court; liability on sheriff's bond, | 702 |
| Bail substituted for deposit, | 703 |
| Deposit applied to plaintiff's judgment, | 704 |
| Defendant in jail, sheriff may take bail. | 705 |
| Sheriff liable as bail, when, | 706 |
| Action on sheriff's bond, when, | 707 |
| Bail exonerated, | 708 |
| Surrender of defendant, | 709 |
| Bail may arrest defendant, | 710 |
| Proceedings against bail by motion, | 711 |
| Bail liable to sheriff, when, | 712 |
| Bail to pay costs, when, | 713 |
| Bail not discharged by amendment, | 714 |
| XXXIV. ATTACHMENT, | 715—746 |
| When issued, | 715 |
| Affidavit must show what, | 716 |
| Affidavits for attachment filed, | 717 |
| By whom granted, | 718 |
| Time of issuance; service of summons essential. | 719 |
| Undertaking, | 720 |
| Validity of undertaking, | 721 |
| To whom warrant directed; what required of officer, | 722 |
| Notice, how served, | 723 |
| How executed; lien on land, | 724 |
| Return of warrant of, by sheriff, | 725 |
| When granted by justice of peace, | 726 |
| Issued by justice of peace, publication, | 727 |
| Justice's attachment against land, | 728 |
| Sale of attached property pendente lite, | 729 |
| Replevy by defendant; undertaking, | 730 |

CAPTIONS.

CIVIL PROCEDURE—Continued.

Sections.

| | |
|---|---------|
| Defendant may apply for discharge and delivery of property, | 731 |
| Defendant's undertaking, | 732 |
| Corporate stock, etc., liable to attachment, | 733 |
| Levied on incorporeal property, | 734 |
| Certificate of defendant's interest to be furnished to sheriff, | 735 |
| Garnishee summoned; answer of; judgment against, | 736 |
| When garnishee fails to appear, | 737 |
| Garnishee denying property; issue tried, | 738 |
| Property with garnishee valued; when excused, | 739 |
| Conditional judgment against garnishee, when, | 740 |
| Judgment, how satisfied, | 741 |
| Plaintiff may sue on defendant's notes, when, | 742 |
| On defendant's recovery, bonds and property delivered to him, | 743 |
| Motion to vacate, or increase security, | 744 |
| Exceptions to and justification of sureties, | 745 |
| Interpleader, | 746 |
| XXXV. CLAIM AND DELIVERY, | 747—759 |
| Claim for delivery of personal property, when, | 747 |
| Affidavit and requisites, | 748 |
| Order for sheriff to seize property and deliver to plaintiff, | 749 |
| Plaintiff's undertaking; copies furnished defendant, | 750 |
| Exceptions to undertaking; liability of sheriff, | 751 |
| Defendant's undertaking for replevy, | 752 |
| Justification of defendant's sureties, | 753 |
| Qualification and justification of defendant's sureties, how, | 754 |
| Property concealed in buildings, | 755 |
| How property seized shall be kept, | 756 |
| Property taken claimed by third person, | 757 |
| When sheriff may deliver property to intervenor, | 758 |
| Sheriff to return undertaking, etc., in ten days, | 759 |
| XXXVI. CONTROVERSY WITHOUT ACTION, | 760—762 |
| How submitted; affidavit; judgment, | 760 |
| Judgment roll, | 761 |
| Judgment enforced; appeal from, | 762 |
| XXXVII. INJUNCTION, | 763—776 |
| Temporary, issued, when, | 763 |
| Solvent defendant restrained from cutting trees, | 764 |
| Timber lands, trial of title to, | 764a |
| When timber may be cut, | 764b |
| Time of issuing; copy of affidavit served, | 765 |
| Not issued for more than twenty days without notice; continues until dissolved, | 766 |
| Issued after answer, only on notice, | 767 |
| Order to show cause; restraint in meantime, | 768 |
| What judges have jurisdiction, | 769 |
| Before what judge returnable, | 770 |
| Stipulation as to judge to hear, | 771 |
| Undertaking, | 772 |
| Damages, | 773 |
| Issued without notice, vacated when; verified answer an affidavit, | 774 |
| Opposing affidavits, | 775 |
| When granted to restrain collection of taxes, | 776 |
| XXXVIII. MANDAMUS, | 777—779 |
| Begun by summons and verified complaint, | 777 |
| Money demand enforced at term, | 778 |
| Other actions returnable in vacation: issues of fact, | 779 |
| XXXIX. NUISANCE, | 780 |
| How remediable, | 780 |

CAPTIONS.

| CIVIL PROCEDURE—Continued. | | Sections. |
|--|--|-----------|
| XL. Quo WARRANTO, | | 781—800 |
| Writs of sci. fa. and quo warranto abolished, | | 781 |
| Action by attorney general upon usurpation or forfeiture of office, | | 782 |
| Leave granted by attorney general to private person, when, | | 783 |
| Solvent sureties required, | | 784 |
| Leave withdrawn, action dismissed; bond insufficient, | | 785 |
| Arrest and bail of defendant usurping office, | | 786 |
| Claim of several persons to office tried in one action, | | 787 |
| Trials expedited, | | 788 |
| Action brought within ninety days after induction into office, | | 789 |
| Defendant's undertaking before answer, | | 790 |
| Possession of office not disturbed pending hearing, | | 791 |
| Judgment by default and enquiry for failure of defendant to give bond, | | 792 |
| Service of summons and complaint. | | 793 |
| Judgment in such actions, | | 794 |
| Judgment for usurping office or franchise; fine, | | 795 |
| Mandamus to aid relator, when, | | 796 |
| On appeal occupant of office to give bond for fees, | | 797 |
| Relator inducted into office, when, | | 798 |
| Damages by usurpation recovered, | | 799 |
| Action to recover forfeited property for state, | | 800 |
| XLI. RECEIVERS, | | 801—804 |
| What judge appoints, | | 801 |
| In what cases appointed, | | 802 |
| Appointment refused, bond being given, when, | | 803 |
| Receiver's bond, | | 804 |
| XLII. TRUST FUNDS SUMMARILY PROTECTED, | | 805—807 |
| Trust funds ordered paid into court, | | 805 |
| Trust funds, etc., ordered seized by sheriff, when, | | 806 |
| Defendant ordered to satisfy sum admitted to be due, | | 807 |
| XLIII. WASTE, | | 808—813 |
| How remediable, | | 808 |
| For and against whom lies, | | 809 |
| Tenant in possession of particular estate liable, | | 810 |
| Action by tenant against co-tenant, | | 811 |
| Heirs may sue, when, | | 812 |
| Judgment for treble damages and possession, | | 813 |
| XLIV. COMPROMISE, | | 814—818 |
| Effect of compromise, | | 814 |
| Tender judgment; effect of refusal to accept, | | 815 |
| Conditional tender of judgment for damages, | | 816 |
| Effect of refusal, | | 817 |
| Disclaimer of title to trespass; tender of judgment, | | 818 |
| XLV. EXAMINATION OF PARTIES, | | 819—827 |
| Action for discovery abolished, | | 819 |
| Adverse party examined, | | 820 |
| Before trial in his own county, | | 821 |
| Party compelled to attend, | | 822 |
| Testimony may be rebutted, | | 823 |
| Refusal to testify; penalty, | | 824 |
| Testimony of party may be rebutted, | | 825 |
| Real party in interest examined, | | 826 |
| Examination of co-plaintiff or co-defendant, | | 827 |
| XLVI. MOTIONS AND ORDERS, | | 828—832 |
| What is an order, | | 828 |
| Motions; where and when made, | | 829 |
| Affidavit for or against, compelled, | | 830 |

CAPTIONS.

| CIVIL PROCEDURE—Continued. | | Sections. |
|----------------------------|---|-----------|
| | Motions determined in ten days, | 831 |
| | Notice of motion, | 832 |
| XLVII. | NOTICES, | 833—840 |
| | In writing, | 833 |
| | On whom served, | 834 |
| | Service upon attorney, | 835 |
| | Served on a party, | 836 |
| | Served by publication, | 837 |
| | Subpoena, issuance and service, | 838 |
| | To what this subchapter applies, | 839 |
| | Officers return evidence of service, | 840 |
| XLVIII. | TIME, | 841—842 |
| | How computed, | 841 |
| | Computation of, in publications, | 842 |
| CLERK OF SUPERIOR COURT, | | 843—877 |
| I. | OFFICE OF, | 843—851 |
| | Includes judge of probate, which is abolished, | 843 |
| | How elected; term of office, | 844 |
| | How inducted into, | 845 |
| | When declared vacant, | 846 |
| | May be resigned, | 847 |
| | When removed from, | 848 |
| | How vacancies filled, | 849 |
| | How furnished with stationery, etc., | 850 |
| | Examined by solicitor, | 851 |
| II. | DEPUTIES, | 852—854 |
| | May be appointed, | 852 |
| | Record of appointment and discharge, | 853 |
| | Clerk responsible for acts of, | 854 |
| III. | POWERS, | 855—859 |
| | Enumeration of, | 855 |
| | When he can not exercise, | 856 |
| | Exercise of, on waiver of disqualification, | 857 |
| | When can not exercise, cause removed. | 858 |
| | Exercised by judge, when, | 859 |
| IV. | DUTIES, | 860—868 |
| | To receive official papers from predecessor, | 860 |
| | To transfer records to successor, how compelled, | 861 |
| | Unperformed duties of outgoing clerk, how compelled, | 862 |
| | When and where to keep office open, | 863 |
| | How leave of absence from office obtained, | 864 |
| | To furnish blank process, bonds and undertakings, | 865 |
| | How papers must be filed, | 866 |
| | To keep record; liable for records and papers, | 867 |
| | Books to be kept, | 868 |
| V. | REPORTS, | 869—873 |
| | List of justices to secretary of state, | 869 |
| | Criminal statistics to attorney general, | 870 |
| | Of funds in hand to county commissioners, | 871 |
| | How approved, recorded, and published, | 872 |
| | Compelled by commissioners, | 873 |
| VI. | MONEY IN HANDS OF, | 874—877 |
| | Paid to persons entitled. | 874 |
| | Fees of jurors and witnesses, when paid to treasurer, | 875 |
| | Used by public till called for. | 876 |
| | Paid indigent children, when, | 877 |

CAPTIONS.

| | Sections. |
|--|-----------|
| COMMISSIONERS OF AFFIDAVITS, | 878—884 |
| Clerks and notaries authorized to take affidavits, | 878 |
| Governor appoints; term of office; powers, | 879 |
| How qualify; may administer oaths, take depositions, affidavits, etc., | 880 |
| Appointments, where recorded; certified copies evidence, | 881 |
| Secretary of state to prepare and publish list in public laws, | 882 |
| Published list conclusive evidence, | 883 |
| Clerks of courts of record in other states, commissioners of deeds, | 884 |
| COMMON LAW, | 885 |
| Common law declared to be in force, | 885 |
| CONSTABLES, | 886—891 |
| How elected, | 886 |
| Oath of office to be taken, | 887 |
| Special constables appointed by justices, | 888 |
| Vacancies filled by board of commissioners, | 889 |
| Powers and duties, | 890 |
| Shall execute notices within justice's jurisdiction, | 891 |
| CONTEMPT, | 892—898 |
| What constitutes; common law repealed, | 892 |
| Punishment, | 893 |
| Court may punish summarily, | 894 |
| Who may punish, | 895 |
| Order to show cause when not committed in presence of court, | 896 |
| What constitutes offense punished as for contempt, | 897 |
| Proceedings as for contempt, how prosecuted, | 898 |
| CONVEYANCES, | 899—902 |
| I. CONSTRUCTION, | 899—902 |
| Construed to be in fee, when, | 899 |
| Attornment unnecessary, conveyance of reversions, etc., | 900 |
| Vagueness of description, | 901 |
| Conveyances to slaves, | 902 |
| II. OFFICER NOT IN OFFICE, | 903—904 |
| Executed by ex-officer, when, | 903 |
| Executed by successor, when, | 904 |
| III. BY HUSBAND AND WIFE, | 905—911 |
| Of wife's land; how proven, | 905 |
| Acknowledgent by, at different times and places; before different officers, | 906 |
| Husband's deed registered though no private examination of wife, | 907 |
| What officers can take private examinations of femes covert, | 908 |
| Private examination procured by fraud, deed good as to innocent purchaser for value, | 909 |
| Under power of attorney from, | 910 |
| Wife need not join in purchase-money mortgage, | 911 |
| IV. FRAUDULENT, | 912—919 |
| Void as to creditors, | 912 |
| When void as to purchasers, | 913 |
| Gifts, indebtedness evidence of fraud, | 914 |
| Marriage settlements, as to existing creditors, | 915 |
| Bona fide conveyances to innocent purchaser for value, valid, | 916 |
| Innocent purchaser for value protected against illegal consideration, | 917 |

CAPIONS.

CONVEYANCES—Continued.

| | Sections. |
|---|-----------|
| Purchasers entitled to remedy of creditors. | 918 |
| Persons removing debtors to defraud creditors, liable as debtor, | 919 |
| V. ASSIGNMENTS FOR CREDITORS, | 920—926 |
| Debts mature on execution of; schedule of preferred debts filed, | 920 |
| Inventories filed within ten days, | 921 |
| Insolvent trustee without bond removed by clerk, | 922 |
| Substituted trustee to give bond, | 923 |
| Only perishable property sold within ten days from registration, | 924 |
| Creditors to file verified statements with trustee, | 925 |
| Trustee to file quarterly accounts; close trust in twelve months, | 926 |
| VI. CONTRACTS TO BE WRITTEN, | 927—931 |
| Charging executor personally, or one with debt of another, | 927 |
| With Indians, | 928 |
| For sale or lease of land. | 929 |
| Sales of liquors on credit. | 930 |
| Promise to revive debt of bankrupt, | 931 |
| VII. REGISTRATION REQUIRED, | 932—941 |
| Probate and registration supplies livery of seizin, | 932 |
| Conveyances, contracts to convey, and leases of land, | 933 |
| Deeds executed prior to January first, one thousand eight hundred and fifty-five, | 934 |
| Mortgages and deeds of trust, | 935 |
| Conditional sales of personal property, | 936 |
| Conditional sales of railroad property. | 937 |
| Marriage settlements, | 938 |
| Deeds of gift, | 939 |
| Powers of attorney, | 940 |
| Certified copies may be registered; used as evidence, | 941 |
| VIII. PROBATE, | 942—952 |
| Before what officers, | 942 |
| Before what nonresident officers. | 943 |
| Commissioner appointed by clerk, maker nonresident, | 944 |
| Before justice of county other than where land lies; clerk's certificate, | 945 |
| Seal of probating officer, when. | 946 |
| Taken anywhere, | 947 |
| When clerk is a party, | 948 |
| Subscribing witness, or maker subpoenaed, when, | 949 |
| Proof of witnesses' handwriting, when, | 950 |
| Proof of maker's handwriting, when. | 951 |
| Clerk or deputy must pass on certificate of other officer, | 952 |
| IX. FORMS, | 953—960 |
| Adjudication and order of registration, | 953 |
| Acknowledgment by grantor, | 954 |
| Private examination of wife, | 955 |
| Private examination and acknowledgment by husband, | 956 |
| Corporate conveyances. | 957 |
| Clerk's certificate upon probate by justice of peace. | 959 |
| Clerk's certificate upon probate by nonresident officer without seal. | 960 |
| X. PROBATES VALIDATED, | 961—979 |
| Errors in registration corrected. | 961 |
| Taken by judge supreme or superior court, or deputy clerks, | 962 |
| Where registered on order of judge, clerk being party, | 963 |
| Notary having certified under his private seal, | 964 |
| Where secretary of state instead of governor has certified to officer, | 965 |
| Where clerks interested. | 966 |
| Where "previously" has been used instead of "privately", | 967 |

CAPTIONS.

| CONVEYANCES— <i>Continued.</i> | Sections. |
|---|---------------|
| Probate in wrong county; by wife before husband, | 968 |
| Acknowledgment before different officers, | 969 |
| Acknowledgment by resident beyond state, | 970 |
| By clerks of criminal courts in Buncombe county, | 971 |
| By clerks of inferior courts, | 972 |
| Before notary or clerk of court of record of another state, | 973 |
| Evidence under preceding section, | 974 |
| Under form previously legal, | 975 |
| Proof of handwriting of grantor refusing to acknowledge, | 976 |
| Proof of corporate articles of agreement, | 977 |
| By de facto officers in Greene, | 978 |
| By clerks of wrong county, | 979 |
| XI. TRUSTEES, | 980—984 |
| Trustee or mortgagee dead, personal representative executes power, | 980 |
| Surviving mortgagee executes power, | 981 |
| Power executed by agent, appointed orally or by writing, | 982 |
| Infant trustees convey, how, | 983 |
| When clerk appoints a new trustee, | 984 |
| XII. CHATTEL MORTGAGE, | 985—987 |
| Form of, | 985 |
| Registration of; notice of sale under, | 986 |
| Mortgages of household and kitchen furniture, | 987 |
| XIII. MORTGAGE SALES, | 988—990 |
| Advertised at courthouse door, | 988 |
| Description of property in advertisement, | 989 |
| Power of sale barred, when, | 990 |
| XIV. REVOCATION AND DISCHARGE, | 991—992 |
| Deeds to persons not in esse revoked, | 991 |
| Mortgages and deeds of trust released, how, | 992 |
| CORONERS, | 993—999 |
| How elected; clerk appoints for special cases, | 993 |
| Oath of office to be taken, | 994 |
| Vacancy, clerk may appoint special, | 995 |
| Powers, penalties and liabilities of special, | 996 |
| Holds inquests; when physician summoned, | 997 |
| Acts as sheriff, when; special coroner, | 998 |
| Compensation of jurors at inquest, | 999 |
| CORPORATIONS, | 1000—1120 |
| I. GENERAL POWERS, | 1000—1006 |
| Corporate powers, | 1000 |
| Implied powers; how far this chapter affects all corporations, | 1001 |
| How land conveyed; certain conveyances void as to torts, | 1002 |
| Mortgaged corporate property subject to execution for labor and torts, | 1003 |
| Gas companies may supply electricity, | 1004 |
| Special powers of gas and electric companies, | 1005 |
| Corporations created hereunder can not do banking business, | 1006 |
| II. LEGISLATIVE CONTROL, | 1007—1008 |
| Legislative power over corporate charters, | 1007 |
| This chapter may be amended; corporations bound thereby; appropriate portions a part of all charters, | 1008 |
| III. FORMATION, | 1009—1016 |
| How created, | 1009 |
| Street railways may be incorporated hereunder, | 1010 |
| Certificate of incorporation, how signed, proved, filed and recorded, | 1011 |

CAPTIONS.

CORPORATIONS—*Continued.*

| | Sections. |
|--|-----------|
| When incorporators become a corporation, | 1012 |
| Incorporators to direct affairs until directors are elected, | 1013 |
| First meeting, how called, | 1014 |
| Death of incorporators; vacancy filled, | 1015 |
| Errors in certificates of incorporation, how corrected, | 1016 |
| IV. BY-LAWS, | 1017—1018 |
| Power to make and alter, | 1017 |
| What they may determine and contain, | 1018 |
| V. OFFICERS, | 1019—1030 |
| Directors, their selection, powers, duties, terms of office, classes, etc., | 1019 |
| Directors must be stockholders, | 1020 |
| Officers, their selection, qualifications, duties, terms, etc., | 1021 |
| Other officers, agents and factors, | 1022 |
| Vacancies, how filled, | 1023 |
| Annual statement after elections; forfeiture for failure to make; duty of secretary of state and attorney general. | 1024 |
| Secretary of state may call for special reports, | 1025 |
| Liability for making false certificates, | 1026 |
| Fraud, liability of officers, directors and stockholders for, | 1027 |
| Who may sue officers and directors personally, | 1028 |
| Action by officer for money advanced, | 1029 |
| Assets of corporation first exhausted, | 1030 |
| VI. CAPITAL STOCK, | 1031—1046 |
| Classes of stock; issued for property or labor, | 1031 |
| Capital stock, how paid; loans to stockholders, | 1032 |
| Stock issued full-paid for property purchased; statements to contain the facts, | 1033 |
| Stockholders, liability for stock not fully paid; fiduciaries and pledgors, | 1034 |
| Certificate of payment of, to secretary of state, | 1035 |
| Liability of officers failing to make certificate, | 1036 |
| Decrease of capital stock, how effected; liability of directors and stockholders, | 1037 |
| Certificates of stock, | 1038 |
| Duplicate certificates issued by directors, | 1039 |
| Action to compel issuance of duplicate certificate, | 1040 |
| Shares, personal property; how transferred; held as collateral, | 1041 |
| Assessments upon shares, | 1042 |
| Shares sold to pay assessments, | 1043 |
| Notice of sale, | 1044 |
| Certain construction companies may take stock and bonds for labor, materials, etc.; statements to contain the facts, | 1045 |
| One corporation may hold stock and securities of another, | 1046 |
| VII. AMENDMENTS, SURRENDER AND EXTENSION, | 1047—1051 |
| Amendments before payment of stock, | 1047 |
| Amendments, generally, | 1048 |
| Change of location of principal office, | 1049 |
| Surrender of corporate rights before payment of stock, | 1050 |
| Extension of corporate existence, | 1051 |
| VIII. CORPORATE MEETINGS, | 1052—1063 |
| Place of meetings; books at principal office; jurisdiction superior court over books, | 1052 |
| Transfer and stock books at principal office; only evidence as to stockholders, when; directors' duties, | 1053 |
| Transfer book determines right to vote, | 1054 |
| Directors, how elected; quorum for, | 1055 |
| Votes stockholders entitled to; cumulative voting, | 1056 |
| Votes stockholders entitled in absence of special provision; proxies; transfers within twenty days of election. | 1057 |

CAPTIONS.

| CORPORATIONS— <i>Continued.</i> | Sections. |
|--|-----------|
| Stock held by fiduciaries, pledgees and married women, | 1058 |
| Stock held by life tenant, | 1059 |
| Shares belonging to corporation, | 1060 |
| Failure to hold election, effect; judge may order, | 1061 |
| Jurisdiction of superior court over elections, | 1062 |
| Meetings called by three stockholders, when, | 1063 |
| IX. DIVIDENDS, | 1064—1065 |
| When declared; working capital, | 1064 |
| From profits and surplus only; liability of directors; limitations of actions, | 1065 |
| X. FOREIGN CORPORATIONS, | 1066—1067 |
| May do business here, | 1066 |
| To file charters and statement with secretary of state; fees therefor; forfeiture, | 1067 |
| XI. DISSOLUTION, | 1068—1084 |
| Voluntary, | 1068 |
| Involuntary, at instance of private persons, | 1069 |
| Attorney general may sue to restrain ultra vires acts; to compel accounts; to remove officers; to preserve property, | 1070 |
| Involuntary, at instance of attorney general, | 1071 |
| Service of summons in actions for, | 1072 |
| Corporate existence continued three years for winding up, | 1073 |
| Upon dissolution, directors to be trustees; powers and duties; debts not extinguished, | 1074 |
| Directors as trustees may sue and be sued, | 1075 |
| Jurisdiction of superior court; may appoint directors or others as receivers; powers and duties, | 1076 |
| Jurisdiction of judge, | 1077 |
| Injunction; when notice and undertaking required, | 1078 |
| Wages for two months lien on assets, | 1079 |
| Distribution of funds, | 1080 |
| Dissolution does not abate actions; receivers to be notified, | 1081 |
| Judgment of forfeiture against a corporation, | 1082 |
| Persons claiming to be corporation liable for costs of action, | 1083 |
| Clerk superior court to file copy of judgment dissolving corporation with secretary of state; costs thereof. | 1084 |
| XII. EXECUTION, | 1085—1091 |
| How issued and on what levied, | 1085 |
| Agent must furnish information as to property to officer with, | 1086 |
| Shares of stock sold under, | 1087 |
| Officer entitled to information as to stock, | 1088 |
| Against debts due corporation; liability of agents refusing compliance, | 1089 |
| Proceedings when custodian of corporate books is a non-resident, | 1090 |
| Duty and liability of nonresident custodian of corporate books, | 1091 |
| XIII. RECEIVERS, | 1092—1105 |
| When appointed, | 1092 |
| Debts provided for, receiver discharged, | 1093 |
| Reorganization after receiver discharged, | 1094 |
| Powers and bond, | 1095 |
| Majority may act; removal of; vacancies, | 1096 |
| Property to vest in, | 1097 |
| Inventory, | 1098 |
| Compensation, | 1099 |
| May send for persons and papers; penalty for refusing to answer, | 1100 |
| Time limit for creditors to present claims, | 1101 |
| Claims, how presented and proved; power and duty of receiver, | 1102 |

CAPTIONS.

CORPORATIONS—*Continued.*

| | Sections. |
|--|------------------|
| Claims reported to court; exceptions in ten days; right to jury trial, | 1103 |
| May become plaintiff in pending actions, | 1104 |
| Property sold pending litigation; fund reserved, | 1105 |
| XIV. TAXES AND FEES, | 1106—1110 |
| State taxes; organization, amendments, dissolution, etc., | 1106 |
| Fees to secretary of state and clerk of superior court, | 1107 |
| Tax on bills creating private corporations; copy to be filed with secretary of state before organization, | 1108 |
| Corporate property liable for taxes, though in receiver's hands, | 1109 |
| Tax collector need not obtain order of court, though property is in receiver's hands, | 1110 |
| XV. REORGANIZATION, | 1111—1114 |
| Corporations whose property and franchises sold under order of court or execution, | 1111 |
| New corporators to meet and organize, | 1112 |
| Duties and powers at meeting, | 1113 |
| Certificate to be filed with secretary of state, | 1114 |
| XVI. MISCELLANEOUS PROVISIONS, | 1115—1120 |
| Name of corporation to be displayed, | 1115 |
| Resident process agent required; in absence service upon secretary of state sufficient: fees, | 1116 |
| Secretary of state to annually publish list of corporations created, | 1117 |
| Mutual corporations may create stock, | 1118 |
| Forfeiture by failure for two years to organize; or after organization, to act: duty of secretary of state and attorney general, | 1119 |
| Meaning of "judge," "court," etc., | 1120 |
| CORPORATION COMMISSION, | 1121—1197 |
| I. COURT, | 1121—1130 |
| Court of record, | 1121 |
| Number of commissioners, | 1122 |
| Term of office, | 1123 |
| Vacancy, | 1124 |
| Qualification of commissioners, | 1125 |
| Oath of office, | 1126 |
| Place of meeting, | 1127 |
| Open at all times, | 1128 |
| Quorum, | 1129 |
| Clerk, | 1130 |
| II. INVESTIGATIONS, | 1131—1132 |
| Examinations, | 1131 |
| Railroad accidents, | 1132 |
| III. POWERS, | 1133—1140 |
| General powers, | 1133 |
| Witnesses; production of papers; contempt, | 1134 |
| Rules of practice, | 1135 |
| Rules of evidence, | 1136 |
| Subpenas, how issued; served, | 1137 |
| Service of orders, | 1138 |
| Undertakings, | 1139 |
| Controversies may be submitted to commission, | 1140 |
| IV. APPEALS, | 1141—1147 |
| Right of, | 1141 |
| How taken, | 1142 |
| Appeal docketed; priority of trial; burden, | 1143 |

CAPTIONS.

| CORPORATION COMMISSION— <i>Continued.</i> | Sections. |
|--|-----------|
| Heard at chambers by consent, | 1144 |
| To supreme court, | 1145 |
| Rates vacated pending appeal, how, | 1146 |
| Judgment superior court not vacated by appeal, | 1147 |
| V. INJUNCTION, | 1148—1151 |
| When granted; bond, | 1148 |
| Restraining order vacated, when, | 1149 |
| Suits on injunction bond, | 1150 |
| What recovered; application of recover, | 1151 |
| VI. PENALTIES, | 1152—1159 |
| For violating rules, | 1152 |
| Refusing to obey orders of commission, | 1153 |
| Discrimination between connecting lines, | 1154 |
| Failure to make reports, | 1155 |
| General offenses, | 1156 |
| Violation of rules, causing injury; damages; limitation. | 1157 |
| Action for, when and how brought, | 1158 |
| Remedies cumulative, | 1159 |
| VII. JURISDICTION, | 1160—1169 |
| Delivering freight, express and baggage, | 1160 |
| Prevent discriminations, | 1161 |
| Telegraph and telephone rates, | 1162 |
| Stations and depots, | 1163 |
| Depots not abandoned, | 1164 |
| Freight and passenger rates, | 1165 |
| Demurrage; storage; placing and loading of cars, | 1166 |
| May fix rate of speed trains may run through a town; petition to be filed; procedure, | 1167 |
| To pass on ordinance, and fix rate of speed, | 1168 |
| When costs on hearing to fix rate of speed in discretion of commission, | 1169 |
| VIII. RATES, | 1170—1178 |
| How fixed, | 1170 |
| What may be carried free, | 1171 |
| Reversion of rates, | 1172 |
| Long and short hauls, | 1173 |
| Contracts as to rates, | 1174 |
| Published, | 1175 |
| Interstate commerce, | 1176 |
| Duplicate freight receipts; charges stated; freight delivered on payment of charges, | 1177 |
| Schedule of rates evidence, | 1178 |
| IX. DUTIES, | 1179—1184 |
| Notice given of violations; suits instituted, | 1179 |
| Fees paid to treasurer, | 1180 |
| Record of receipts and disbursements, | 1181 |
| Fiscal year, | 1182 |
| Report of commission, | 1183 |
| Expenses, | 1184 |
| X. TAX COMMISSIONERS, | 1185—1197 |
| Tax commissioners, | 1185 |
| Clerk, | 1186 |
| Place of meeting, | 1187 |
| Examination of papers, | 1188 |
| Duties, | 1189 |
| Board of equalization, | 1190 |
| Hearing; judgment; how tax list corrected, | 1191 |
| General review of tax list, | 1192 |
| Who acts on general review; judgment, | 1193 |

CAPTIONS.

| | | |
|---|--|-----------|
| CORPORATION COMMISSION— <i>Continued.</i> | | Sections. |
| | Property omitted, how listed, | 1194 |
| | Notice of meeting as board of equalization, | 1195 |
| | Fees of assessors, action of commission final, | 1196 |
| | Report made, | 1197 |
| COSTS, | | 1198—1255 |
| I. GENERALLY, | | 1198—1207 |
| | What allowed, | 1198 |
| | Summary judgment for uncollected, | 1199 |
| | Judgment and execution for, against sureties on prosecution or appeal bond, | 1200 |
| | Executions for, when issued; irregular if not itemized, | 1201 |
| | Juror's tax fees, | 1202 |
| | Criminal not demandable in advance, | 1203 |
| | Clerk to insert, in entry of judgment, | 1204 |
| | Bills of criminal costs itemized; approved by solicitor, | 1205 |
| | Justices required to itemize bills of, | 1206 |
| | Bills of, open to the public, | 1207 |
| II. STATE LIABLE, WHEN, | | 1208—1212 |
| | Civil actions by the state, | 1208 |
| | Civil actions by and against state officers, | 1209 |
| | Civil actions by state for individuals, | 1210 |
| | In bribery prosecutions, | 1211 |
| | On appeal by state to supreme court of United States, | 1212 |
| III. CIVIL ACTIONS AND PROCEEDINGS, | | 1213—1226 |
| | When allowed plaintiff; when limited by amount of recovery, | 1213 |
| | When allowed defendant, | 1214 |
| | Discretionary in other actions, | 1215 |
| | When in discretion of the court, | 1216 |
| | Petitioner pays, when, | 1217 |
| | Defendant pays, unreasonably defending action after notice, no personal claim, | 1218 |
| | None allowed to party suing on usurious contract, | 1219 |
| | In special proceedings, | 1220 |
| | Allowed in supplemental proceedings, | 1221 |
| | Laying off homestead and exemptions, | 1222 |
| | On re-assessment of homestead, | 1223 |
| | Against infant plaintiff, guardian responsible, | 1224 |
| | Actions by or against executors, trustees or persons authorized by statute, | 1225 |
| | Assignee after action brought, liable for, | 1226 |
| IV. ON APPEALS, | | 1227—1229 |
| | Generally, | 1227 |
| | From justices of the peace, | 1228 |
| | Not allowed plaintiff unless his recovery is greater than before justice, | 1229 |
| V. LIABILITY OF COUNTIES IN CRIMINAL ACTIONS, | | 1230—1237 |
| | County pays, when, | 1230 |
| | County liable in supreme court, when, | 1231 |
| | County where offense committed to pay costs; if not paid prisoner returned, | 1232 |
| | Statement of, chargeable to county, filed with commissioners, | 1233 |
| | Expense incurred in going after prisoner, how paid, | 1234 |
| | Lynching, costs of investigation, | 1235 |
| | When county pays state's witnesses, | 1236 |
| | When county pays defendant's witnesses, | 1237 |
| VI. LIABILITY OF DEFENDANT IN CRIMINAL ACTIONS, | | 1238—1241 |
| | When defendant pays, | 1238 |
| | Defendant imprisoned, detained until cost paid, | 1239 |

CAPTIONS.

| | |
|--|-----------|
| COSTS— <i>Continued.</i> | Sections. |
| Confession of judgments to secure fine and cost, | 1240 |
| Defendant failing to pay, may be arrested, | 1241 |
| VII. THE PROSECUTOR, | 1242—1244 |
| Who is prosecutor; when pays costs, | 1242 |
| Pay of witnesses in criminal cases, | 1243 |
| When imprisoned for, | 1244 |
| VIII. WITNESSES, | 1245—1253 |
| Not entitled to, in advance, | 1245 |
| Must prove attendance; may recover therefor, | 1246 |
| Tickets filed with clerk; only two to prove same fact, | 1247 |
| Pay of, before jury of view or commissioner, | 1248 |
| When witness before grand jury, | 1249 |
| State's paid, when; only two paid; one attendance, one day, | 1250 |
| Only two bound over on appeal in criminal action, | 1251 |
| How discharged; certificate of attendance filed, | 1252 |
| Not paid unless certified; discretion of judge, | 1253 |
| IX. CRIMINAL COSTS BEFORE JUSTICES, | 1254—1255 |
| Who pays in justice's court, | 1254 |
| Defendant imprisoned for, | 1255 |
| COUNTY COMMISSIONERS, | 1256—1281 |
| I. GENERAL PROVISIONS, | 1256—1257 |
| Body politic; powers exercised by commissioners, | 1256 |
| Corporate powers, | 1257 |
| II. ELECTION OF, | 1258—1263 |
| By qualified voters; number, | 1258 |
| By justices of peace. | 1259 |
| Meetings of justices of the peace in certain counties, | 1260 |
| Vacancies in board, how filled, | 1261 |
| Vacancies in board, how filled in certain counties, | 1262 |
| When board to qualify; oath to be filed, | 1263 |
| III. MEETINGS, | 1264 |
| Meetings of board, | 1264 |
| IV. POWERS AND DUTIES, | 1265—1270 |
| Powers given board, | 1265 |
| Powers in certain counties, | 1266 |
| Purchase of county indebtedness, | 1267 |
| To fill vacancies in certain offices, | 1268 |
| To settle disputed county lines, | 1269 |
| Such commissioners, how sworn and paid, | 1270 |
| V. CLERK TO BOARD, | 1271—1273 |
| Register of deeds ex officio; compensation, | 1271 |
| Duties, | 1272 |
| To publish annual statement, | 1273 |
| VI. COUNTY POOR, | 1274—1281 |
| County commissioners to provide for support of; superintendent, | 1274 |
| County home for aged and infirm, | 1275 |
| How county home supported, | 1276 |
| Indigent persons owning property, | 1277 |
| Families of militiamen supported by county, | 1278 |
| Paupers not to be hired out by auction, | 1279 |
| Legal settlements, how acquired, | 1280 |
| Removed to proper county, at cost of that county; house-keepers entertaining poor. | 1281 |

CAPTIONS.

| | |
|---|-----------|
| | Sections. |
| COUNTY PRISONS, | 1282—1322 |
| I. JAILS, | 1282—1288 |
| Built and repaired by commissioners, | 1282 |
| Five apartments, | 1283 |
| Heated, | 1284 |
| Bedding furnished, | 1285 |
| Prison bounds, | 1286 |
| Bonds returned to court, | 1287 |
| Bond on capias in civil action, | 1288 |
| II. PRISONERS KEPT AND CARED FOR, | 1289—1295 |
| United States prisoners kept, | 1289 |
| Jailer to cleanse jail, furnish food and water, | 1290 |
| May purchase necessities, | 1291 |
| Escape apprehended, guard; compensation, | 1292 |
| Prisoners to pay charges, | 1293 |
| Guarding and removing, by what county paid, | 1294 |
| Transferred to successor by indenture, | 1295 |
| III. OF ADJOINING COUNTY USED, | 1296—1298 |
| By ministerial officers, when, | 1296 |
| When no jail, or jail unsafe, | 1297 |
| When jail destroyed, | 1298 |
| IV. FARMING OUT PRISONERS, | 1299—1301 |
| Counties and towns may, | 1299 |
| Party hiring may prevent escape, | 1300 |
| Sheriff has control, | 1301 |
| V. CONVICTS ON PUBLIC ROADS, | 1302—1306 |
| What convicts so sentenced, | 1302 |
| Under control of county authorities, | 1303 |
| When sentenced to state's prison, | 1304 |
| When state's prison to send convicts to county, | 1305 |
| Taxes levied to maintain, | 1306 |
| VI. HOUSES OF CORRECTION, | 1307—1319 |
| Commissioners may establish, | 1307 |
| Taxes may be levied, | 1308 |
| Bonds may be issued, | 1309 |
| Governor notified of establishment of, | 1310 |
| Directors appointed; duties, | 1311 |
| Term of office of directors, | 1312 |
| Manager appointed; bond given, | 1313 |
| Manager to assign employment, | 1314 |
| Compensation of officers, | 1315 |
| Sheriff to convey persons committed, | 1316 |
| Absconding offenders punished, | 1317 |
| Vagrants may be released, when, | 1318 |
| Suits in name of county, | 1319 |
| VII. JOINT HOUSES OF CORRECTION, | 1320—1322 |
| Two or more may join, | 1320 |
| Board of directors appointed, | 1321 |
| General managers appointed, | 1322 |
| COUNTY REVENUE, | 1323—1340 |
| I. TAXES AND FINES, | 1323—1326 |
| Taxes collected by sheriff, | 1323 |
| Statement of fines kept by clerk, | 1324 |
| Fines paid treasurer, when; for schools, | 1325 |
| Commissioners expend county funds, | 1326 |
| II. REPORTS OF OFFICERS, | 1327—1330 |
| Made annually, | 1327 |
| Compelled, | 1328 |

CAPTIONS.

| | |
|---|-----------|
| COUNTY REVENUE— <i>Continued.</i> | Sections. |
| Registered, | 1329 |
| Penalty for failure to make, | 1330 |
| III. CLAIMS, | 1331—1335 |
| Demand before suit, | 1331 |
| Itemized and verified, | 1332 |
| Numbered as presented, | 1333 |
| Numbered as allowed, when, | 1334 |
| Annual statement published, | 1335 |
| IV. FINANCE COMMITTEE, | 1336—1340 |
| Election and duties, | 1336 |
| Oath, | 1337 |
| Powers of, | 1338 |
| Penalty on officer failing to settle, | 1339 |
| Statement by, published, | 1340 |
| COUNTY TREASURER, | 1341—1357 |
| When elected, | 1341 |
| How abolished, | 1342 |
| Includes person acting as such; treasurer of county board of education, | 1343 |
| Sheriff acting as such, bond liable, | 1344 |
| Duties, | 1345 |
| Commissioners may designate banks of deposit for funds in hands of, | 1346 |
| Statement to be filed with commissioners; interest belongs to fund, | 1347 |
| Transportation expenses borne by; fund loses if bank fails, | 1348 |
| Not to speculate in county claims; forfeits office thereby, | 1349 |
| Administers property held in trust for county, | 1350 |
| To take charge of county trust funds; additional bond required, | 1351 |
| Commissioners to keep a record of trust funds, | 1352 |
| Exhibits amounts and condition of trust funds, | 1353 |
| Pays no claim unless audited, | 1354 |
| Books, papers and money delivered to successor, | 1355 |
| Action on bond, brought by commissioners, | 1356 |
| Officers failing to account to treasurer sued by county commissioners, | 1357 |
| COURTS—JUSTICES. | 1358—1442 |
| I. GENERAL PROVISIONS, | 1358—1364 |
| Constitution, article seven abrogated; exceptions, | 1358 |
| When and how justices elected, | 1359 |
| When justices shall qualify; vacancies, | 1360 |
| Office forfeited by removal from township, | 1361 |
| Resignation, | 1362 |
| Punishment on conviction of infamous crimes, | 1363 |
| Office under the United States, | 1364 |
| II. DOCKETS, | 1365—1367 |
| Furnished by county commissioners, | 1365 |
| Filed with clerks, | 1366 |
| Dockets, papers and books delivered to clerk for successor, | 1367 |
| III. CIVIL JURISDICTION, | 1368—1375 |
| Actions on contract, | 1368 |
| Actions not on contract, | 1369 |
| Actions dismissed, when; remitter for jurisdiction, | 1370 |
| Where title to real estate is in controversy, | 1371 |
| Title to real estate in controversy, action dismissed, | 1372 |
| Another action may be brought; estoppel by former plea, | 1373 |

CAPTIONS.

COURTS—JUSTICES—Continued.

| | Sections. |
|--|-----------|
| May issue process and try causes, where, | 1374 |
| Profane swearing punished as a contempt. | 1375 |
| IV. CRIMINAL JURISDICTION, | 1376 |
| Jurisdiction in criminal actions, | 1376 |
| V. JURORS IN JUSTICES' COURTS, | 1377—1392 |
| Jury list furnished, | 1377 |
| To keep jury box, | 1378 |
| Names of jurors deposited in box, | 1379 |
| Trial by jury waived, if not demanded, | 1380 |
| Deposit of jury fees, | 1381 |
| Jury drawn and trial postponed, | 1382 |
| Summoning the jury, | 1383 |
| Jury for trial, how selected, | 1384 |
| Challenges, | 1385 |
| What names returned to the jury box, | 1386 |
| Tales jurors may be summoned, | 1387 |
| Not compelled to serve out of township, | 1388 |
| Less than six a jury by consent, | 1389 |
| Jurors serving on trial, | 1390 |
| Additional deposit for jury fees for adjournment, | 1391 |
| Jury sworn; impaneled; verdict; judgment, | 1392 |
| VI. PROCEDURE BEFORE TRIAL, | 1393—1402 |
| Summons, civil action begun by, | 1393 |
| Summons, by whom issued and what to contain, | 1394 |
| Service and return of summons; fees in advance, | 1395 |
| When process issues to another county, | 1396 |
| How process issues to another county, | 1397 |
| Certificate of clerk on process for another county, | 1398 |
| When judgment entered against defendants in another county, | 1399 |
| Attendance of witnesses procured, | 1400 |
| When subpoenas issue to other counties; costs in advance, | 1401 |
| Removals, | 1402 |
| VII. RULES OF PROCEDURE, | 1403—1424 |
| Rule I. Pleadings, | 1403 |
| Rule II. Pleadings, oral or written, | 1404 |
| Rule III. Complaint, | 1405 |
| Rule IV. Answer, | 1406 |
| Rule V. Demurrer, | 1407 |
| Rule VI. When demurrer is sustained, | 1408 |
| Rule VII. No particular form for pleadings, | 1409 |
| Rule VIII. No judgment by default, | 1410 |
| Rule IX. Action on account or note, | 1411 |
| Rule X. Variance between pleading and proof, | 1412 |
| Rule XI. Process not quashed for form, | 1413 |
| Rule XII. Pleadings amended, | 1414 |
| Rule XIII. Account or demand exhibited, | 1415 |
| Rule XIV. Proceedings recorded, | 1416 |
| Rule XV. Tender of judgment, | 1417 |
| Rule XVI. Continuance, | 1418 |
| Rule XVII. Civil procedure applicable to forms, limitations and parties, | 1419 |
| Rule XVIII. Civil procedure applicable in attachment, | 1420 |
| Rule XIX. Civil procedure applicable in claim and delivery and in arrest and bail, | 1421 |
| Rule XX. Damages to real estate and conversion of personalty, same rules, | 1422 |
| Rule XXI. Suit on judgment, evidence in, | 1423 |
| Rule XXII. When rehearing granted, | 1424 |

CAPTIONS.

| COURTS—JUSTICES— <i>Continued.</i> | Sections. |
|---|-----------|
| VIII. JUDGMENT AND EXECUTION, | 1425—1434 |
| Docketing justice's judgment; lien; stay of execution; clerk's duty; costs; docketed in other counties, | 1425 |
| Justice's judgment removed to another county, | 1426 |
| Execution, when issued and returnable, | 1427 |
| Execution on, when a lien, and on what, | 1428 |
| Stay of execution granted by justice, | 1429 |
| Security on stay of execution, | 1430 |
| Execution stayed; undertaking on appeal before clerk, | 1431 |
| Undertaking on appeal before justice, | 1432 |
| Undertaking on appeal; what to contain, | 1433 |
| Delivery of undertaking, execution stayed; copy served on appellee, | 1434 |
| IX. APPEAL, | 1435—1441 |
| New trial not allowed; either party may appeal, | 1435 |
| Does not stay execution, | 1436 |
| Appeal, when and how taken. | 1437 |
| Notice in open court sufficient, | 1438 |
| Justice to make return of within ten days, | 1439 |
| Defective return amended. | 1440 |
| Restitution, when ordered, | 1441 |
| X. FORMS, | 1442 |
| Forms to be used in justice's court, | 1442 |
| COURTS—SUPERIOR, | 1443—1479 |
| I. OFFICERS OF, | 1443—1446 |
| Judges to take oath of office, | 1443 |
| Vacancies, how filled | 1444 |
| Power to discharge drunken solicitor, | 1446 |
| II. JURISDICTION, | 1447—1453 |
| Original, | 1447 |
| In vacation or at term, | 1448 |
| Appellate, | 1449 |
| Equity cases transferred to, | 1451 |
| Surveys in disputed boundaries, | 1452 |
| Contiguous lands held under one survey, how. | 1453 |
| III. TERMS OF COURT, | 1454—1458 |
| When held, | 1454 |
| Civil process and motions at criminal terms, | 1455 |
| No grand jury drawn nor criminal process returnable to or solicitors attend, civil terms, | 1456 |
| Rotation of judges, | 1457 |
| Court adjourned by sheriff when judge not present, | 1458 |
| IV. SPECIAL TERMS, | 1459—1466 |
| What judge holds; exchange of courts, | 1459 |
| How ordered, | 1460 |
| Notice of, | 1461 |
| Certificate of attendance; compensation, | 1462 |
| Grand juries for, | 1463 |
| Jurisdiction. | 1464 |
| All persons must attend; process not returnable to. | 1465 |
| Subpœnas returnable to, | 1466 |
| V. PRACTICE, | 1467—1476 |
| Minutes read each morning, | 1467 |
| Nonsuit not allowed after verdict, | 1468 |
| Suit for penalty, plaintiff may reply fraud to plea of release, | 1469 |
| Suit on bonds; defendant may plead satisfaction, | 1470 |
| Sum due with interest and costs, discharges penalty of bonds, | 1471 |
| Proceeds of judicial sales collected on motion, | 1472 |

CAPTIONS.

COURTS—SUPERIOR—*Continued.*

Sections.

| | |
|--|------|
| Judicial sale confirmed, purchaser deemed owner, | 1473 |
| Procedure after appeal, | 1474 |
| Officer attending juries sworn, | 1475 |
| Quakers may wear hats in court, | 1476 |

| | |
|---|-----------|
| VI. PROCESS, | 1477—1479 |
| Return on notice, evidence, | 1477 |
| When directed to officer of adjoining county, | 1478 |
| Sheriff interested and no coroner, issues to officer of adjoining county, | 1479 |

COURTS—SUPREME,

1480—1502

| | |
|---|-----------|
| I. HOW AND WHEN HELD, | 1480—1484 |
| How constituted, | 1480 |
| Justices to take oath of office, | 1481 |
| Quorum, | 1482 |
| Convenes, when, | 1483 |
| Sits until business is dispatched; name of court; adjourned if no justice present first week, | 1484 |

| | |
|---|-----------|
| II. PRACTICE IN, | 1485—1498 |
| Original jurisdiction, claims against state, | 1485 |
| Manner of prosecuting claims against the state, | 1486 |
| Jurisdiction as court of review, | 1487 |
| How cases taken to, | 1488 |
| May make rules of court, | 1489 |
| Judgment on record; execution, where returnable, | 1490 |
| Appeals dismissed, when, | 1491 |
| No judgment on interlocutory order; opinion certified below, | 1492 |
| Power over amendments; further testimony, when, | 1493 |
| Petition to rehear may be filed when; execution restrained, | 1494 |
| Exhibits, how proved, | 1495 |
| Opinions and judgments to be in writing, | 1496 |
| Certificates transmitted, when; execution for costs; penalty, | 1497 |
| Records recorded, | 1498 |

| | |
|--------------------------------------|-----------|
| III. OFFICERS OF, | 1499—1502 |
| May appoint acting attorney general, | 1499 |
| Reporter, | 1500 |
| Clerk, | 1501 |
| Marshal, | 1502 |

| | |
|-----------|------|
| DESCENTS, | 1503 |
| Rules of, | 1503 |

DIVORCE AND ALIMONY,

1504—1518

| | |
|---|------|
| Jurisdiction, | 1504 |
| Bond for costs unnecessary, | 1505 |
| Venue, | 1506 |
| Marriage between whites and negroes or indians declared void, | 1507 |
| What marriages may be declared void on application of either party, | 1508 |
| Grounds for absolute divorce, | 1509 |
| From bed and board, grounds, | 1510 |
| Affidavit to be filed with complaint; provisos, | 1511 |
| Material facts found by jury, parties cannot testify to adultery, | 1512 |
| Alimony on divorce from bed and board, | 1513 |
| Alimony pendente lite, | 1514 |
| Alimony without divorce, when, | 1515 |
| Alimony in real estate, writ of possession issued, | 1516 |
| Effects of absolute divorce, | 1517 |
| Custody of children in divorce, | 1518 |

CAPTIONS.

| | Sections. |
|--|-----------|
| DRAINAGE, | 1519—1559 |
| I. CANAL ESTABLISHED, | 1519—1526 |
| Petition filed; clerk appoints commissioners, | 1519 |
| Duty of commissioners, | 1520 |
| Report; easement in fee; curtilage and mill protected; nuisance forbidden, | 1521 |
| Width of right of way, | 1522 |
| When owner can fence or cross canal, | 1523 |
| Earth for dam; owner may adjoin his dam, when, | 1524 |
| Earth from, canal, removed or leveled, | 1525 |
| Drain not to be opened within thirty feet of canal, | 1526 |
| II. CANAL DRAINED INTO; REPAIRED, | 1527—1532 |
| Right to drain into canal, how obtained, | 1527 |
| Labor for repair apportioned; on confirmation to be a judgment, | 1528 |
| How joint canals repaired, | 1529 |
| Judgment on failing to repair; a lien on land, | 1530 |
| Assignee bound as original owner to repair, | 1531 |
| How amount of contribution for repair ascertained, | 1532 |
| III. CORPORATION FOR, | 1533—1540 |
| Procedure to drain swamp lands; corporation created, | 1533 |
| Commissioners appointed to examine and report, | 1534 |
| May employ a surveyor, | 1535 |
| When report confirmed, | 1536 |
| Effect of confirmation; proprietors a corporation, | 1537 |
| Corporate name; officers; by-laws; powers, | 1538 |
| Shares annexed to land, | 1539 |
| Shareholder to obey by-laws and pay assessments, | 1540 |
| IV. CORPORATION FORMED; CANAL CUT, | 1541—1547 |
| Payment of dues entitles shareholder to use of canal, | 1541 |
| Privilege of infants, | 1542 |
| Compensation for damage to lands, | 1543 |
| Court may dissolve corporation, | 1544 |
| Method of incorporating a joint canal already constructed, | 1545 |
| Laborer's lien for work on canal, | 1546 |
| Penalty for nonpayment of assessment, | 1547 |
| V. DRAINED WITHOUT CORPORATION, | 1548—1552 |
| Procedure to drain lowlands in Hyde, | 1548 |
| Board to meet, make report; what report to show, | 1549 |
| Report to be in writing; what to contain; costs, | 1550 |
| Persons whose lands are drained shall keep canal on his land clear, | 1551 |
| Compensation of board and county surveyor, | 1552 |
| VI. SERVIENT OWNER, | 1553—1555 |
| Procedure to drain lowlands, | 1553 |
| Commissioners to examine lands and make report, | 1554 |
| Costs of repairs to be enforced by judgment, | 1555 |
| VII. MISCELLANEOUS, | 1556—1559 |
| Servient owner refusing to repair, dominant owner may, | 1556 |
| Canal dug seven years evidence of its necessity; owner may apply to clerk to have labor of repairing apportioned; method of procedure, | 1557 |
| Easement of drainage may be surrendered; liability for assessments to cease, | 1558 |
| Proceeding, a special proceeding, | 1559 |
| ELECTRIC COMPANIES, | 1560—1566 |
| May use public highways, | 1560 |
| May acquire easement in right of way, | 1561 |
| May exercise right of eminent domain, | 1562 |

CAPTIONS.

| | |
|--|-----------|
| ELECTRIC COMPANIES— <i>Continued.</i> | Sections. |
| Proceedings to condemn land, | 1563 |
| Copy of petition to be served, | 1564 |
| Proceedings same as for railroads, | 1565 |
| Commissioners to inspect premises, | 1566 |
| ESTATES, | 1567—1579 |
| Estates in tail, converted into fee simple, | 1567 |
| Joint tenancy, survivorship abolished, when, | 1568 |
| Survivorship among trustees, | 1569 |
| How certain contingent limitations construed, | 1570 |
| Unborn infant in esse may take by deed, | 1571 |
| Heirs of living person construed to mean children, | 1572 |
| Conveyance to use, possession transferred to use without livery of seizin, | 1573 |
| Rights of grantee of reversion against life tenant, | 1574 |
| Right of life tenant against grantee of reversion, | 1575 |
| Collateral warrants abolished; warranties by life tenant good only as to heir, | 1576 |
| Spendthrift trusts authorized, | 1577 |
| Titles quieted, | 1578 |
| Contingent remainder may be sold; procedure; proviso, | 1579 |
| EVIDENCE, | 1580—1643 |
| I. STATUTES, | 1580—1583 |
| How proved, | 1580 |
| Martin's collection; copies certified by secretary of state, | 1581 |
| Laws of other states or foreign countries, how proved, | 1582 |
| Town ordinances, | 1583 |
| II. GRANTS, DEEDS AND WILLS, | 1584—1601 |
| Copies certified by secretary of state, | 1584 |
| Copies of grants certified by clerk of secretary of state validated, | 1585 |
| Copies certified by register of deeds, evidence, when, | 1586 |
| Copy certified may be registered in another county and given in evidence, | 1587 |
| Evidence to support title under H. E. McCulloch, | 1588 |
| Grant or copy from proprietor, sufficient evidence of title under him, | 1589 |
| Deeds registered and lost, registry lost, presumed in due form, | 1590 |
| Copy of will, | 1591 |
| Evidence to fit the land to the description, | 1592 |
| Recitals in tax deeds in Haywood and Henderson, | 1593 |
| Copies of wills in secretary of state's office; proviso, | 1594 |
| Copies of wills recorded in wrong counties, | 1595 |
| Proved will lost, not recorded, copy evidence, | 1596 |
| Copies of grants in Burke, | 1597 |
| Copies of lost records in Bladen, | 1598 |
| Copies of records from Tyrrell, | 1599 |
| Copies of grants in Moore, | 1600 |
| Wills in Haywood, | 1601 |
| III. OFFICIAL WRITINGS, | 1602—1603 |
| Copies of official writings, | 1602 |
| Copies from public records of the state or United States, evidence; how authenticated, | 1603 |
| IV. RECORDS, ETC., OTHER STATES, | 1604—1605 |
| Records of administration and letters testamentary in other states, how certified, | 1604 |
| Wills or deeds in other states, how proven, | 1605 |

CAPTIONS.

EVIDENCE—Continued.

| | Sections. |
|---|-----------|
| V. COUNSEL AND PHYSICIANS, | 1606—1607 |
| Fraud on the state, counsel must testify; proviso, | 1606 |
| Privilege of attending physicians and surgeons, | 1607 |
| VI. ACCOUNTS, | 1608—1611 |
| Book accounts under sixty dollars, and within two years, | 1608 |
| Book accounts proved by personal representative, | 1609 |
| Copies of book accounts evidence, when, | 1610 |
| Itemized accounts evidence, when, | 1611 |
| VII. MORTUARY TABLES, | 1612 |
| Mortuary tables evidence, | 1612 |
| VIII. COMPETENCY OF WITNESSES, | 1613—1622 |
| Not incapacitated by interest or crime, | 1613 |
| Evidence of parties admissible; exceptions, | 1614 |
| When one party to transaction is dead, | 1615 |
| Executors may testify as to estate in their hands, when, | 1616 |
| Party examined by adverse party, when, | 1617 |
| Defendant competent in criminal actions; husband or wife com- petent for defendant, | 1618 |
| Defendant in criminal actions not compellable to give evidence against himself; nor husband or wife against the other, | 1619 |
| Husband and wife witnesses, | 1620 |
| Persons testifying in gambling not prosecuted, | 1621 |
| Lynching, witness must testify; pardoned, | 1622 |
| IX. ATTENDANCE OF WITNESS, | 1623—1628 |
| How procured, | 1623 |
| How procured before jury of view, referee or commissioners, | 1624 |
| When subpoena duces tecum may issue, | 1625 |
| Cause removed, subpoenas and commissions to take depositions, issued from either county, | 1626 |
| Witness to attend until discharged; penalty nonattendance, how paid; judgment n. si. only, | 1627 |
| Not arrested in civil cases while attending court, | 1628 |
| X. DEPOSITIONS, | 1629—1639 |
| What may be read on the trial, | 1629 |
| In justices' courts, | 1630 |
| Not quashed after trial begun, | 1631 |
| Objections taken before trial, | 1632 |
| Commissioners may subpoena witness and punish for contempt, | 1633 |
| Attendance before commissioner, how enforced, | 1634 |
| Remedies against defaulting witness before commissioner, | 1635 |
| How taken, | 1636 |
| How taken in hearings before municipal authorities, | 1637 |
| In quo warranto proceedings, how taken, | 1638 |
| Taken in the state, action in another state, | 1639 |
| XI. WRITINGS, PRODUCTION, INSPECTION, | 1640—1642 |
| Inspection before trial, | 1640 |
| Production on trial, | 1641 |
| Admission of genuineness procured, | 1642 |
| XII. CONFEDERATE CURRENCY, | 1643 |
| Scale of depreciation, | 1643 |
| FENCES AND STOCK LAW, | 1644—1670 |
| I. LAWFUL FENCES, | 1644—1647 |
| Fences to be five feet high, | 1644 |
| Four and a half feet in certain counties, | 1645 |
| Four feet in certain counties, | 1646 |
| Water-courses, on application to commissioners, made, | 1647 |
| II. JOINT FENCES, | 1648—1655 |
| Jointly maintained, | 1648 |

CAPTIONS.

| | | |
|---|--|-----------|
| FENCES AND STOCK LAW— <i>Continued.</i> | | Sections. |
| | Jointly paid for, when, | 1649 |
| | Value of dividing fence ascertained, how, | 1650 |
| | Jurors to report how fence kept up, | 1651 |
| | Report registered by register of deeds, | 1652 |
| | Final judgment binding, | 1653 |
| | Remedy against delinquent owner, | 1654 |
| | How removed, | 1655 |
| III. | STOCK LAW, | 1656—1670 |
| | County elections, | 1656 |
| | Township elections, | 1657 |
| | District elections, | 1658 |
| | Persons within territory allowed to withdraw, | 1659 |
| | Elections, how held, | 1660 |
| | Powers and duties of commissioners, | 1661 |
| | Land adjoining stock law territory, | 1662 |
| | Stock not to run at large, impounded, | 1663 |
| | Owner notified; sale of stock; application of proceeds, | 1664 |
| | Stock defined, | 1665 |
| | Impounded stock may be fed; pay for same, | 1666 |
| | Fence built around territory, | 1667 |
| | Lawful fence in stock law territory, | 1668 |
| | Fence built by assessment on land owners, | 1669 |
| | Land condemned, | 1670 |
| GAMING CONTRACTS, | | 1671—1674 |
| | Gaming and betting contracts void, | 1671 |
| | Players and betters competent witnesses, | 1672 |
| | Certain contracts for future delivery, void, | 1673 |
| | Invalidity pleaded shifts burden of proof; plea and proof not used in criminal action, | 1647 |
| GRANTS, | | 1675—1734 |
| I. | TO WHOM ISSUED, | 1675 |
| | Citizens and bona fide residents, | 1675 |
| II. | WHAT MAY BE GRANTED, | 1676—1682 |
| | Land subject to, | 1676 |
| | What swamp lands may be, | 1677 |
| | Swamp lands defined, | 1678 |
| | Land covered by water, for wharves, | 1679 |
| | Fisheries established, | 1680 |
| | Prior right of fishery in whom, | 1681 |
| | What void; not color of title, | 1682 |
| III. | ENTRY-TAKER, | 1683—1689 |
| | How elected: term of office, | 1683 |
| | Register of deeds acts as, when, | 1684 |
| | Who issues warrant on death of entry-taker, | 1685 |
| | Oath of office: fees, | 1686 |
| | Office of entry-taker at courthouse, | 1687 |
| | Makes annual return, | 1688 |
| | Penalty failing to make returns, how recovered, | 1689 |
| IV. | ENTRIES, | 1690—1695 |
| | In writing, and describe land, | 1690 |
| | Duty of entry-taker, | 1691 |
| | Protest filed, when and by whom, | 1692 |
| | When entry lapses, subsequent entry valid, | 1693 |
| | When for benefit of entry-taker, | 1694 |
| | Lapsed entries, not renewed within one year, | 1695 |
| V. | SURVEYS, | 1696—1704 |
| | When warrant for survey issued, | 1696 |
| | Duplicate warrants, | 1697 |

CAPTIONS.

| | |
|---|-----------|
| GRANTS— <i>Continued.</i> | Sections. |
| Order of survey, | 1698 |
| How made, | 1699 |
| Sworn chainbearers, | 1700 |
| Plots made and transmitted to secretary of state, | 1701 |
| Special surveyor, when and how appointed, | 1702 |
| May appoint deputies, | 1703 |
| When county surveyor interested, | 1704 |
| VI. GRANTS, | 1705—1713 |
| When secretary of state may withhold grant, | 1705 |
| On what grant issued, | 1706 |
| When, how and to whom issued, | 1707 |
| Claimant dying, right descends, | 1708 |
| When entry price paid, | 1709 |
| Price paid state treasurer, when, | 1710 |
| Price of land; may be sold to other than claimant, | 1711 |
| Plot attached to grant, | 1712 |
| Number of survey put in grant, | 1713 |
| VII. CORRECTING, | 1714—1724 |
| County line changed after entry, before grant and registra- | |
| tion, grant valid, | 1714 |
| Entries in wrong county, grant valid, | 1715 |
| How errors in survey or plots corrected, | 1716 |
| Resurvey of lands to correct grants, how obtained, | 1717 |
| Seal lost, how replaced, | 1718 |
| Errors in grants, how corrected, | 1719 |
| In Macon and Jackson; notice given, | 1720 |
| Irregular entries validated, | 1721 |
| Grants issued prior to 1829, validated, | 1722 |
| Grants to surveyors prior to 1829, confirmed, | 1723 |
| Time for registering grants extended, | 1724 |
| VIII. GRANTS VACATED, | 1725-1727 |
| Suits to vacate grants, when and where brought, | 1725 |
| Judgment vacating grant, recorded in secretary of state's | |
| office, | 1726 |
| When state will bring suit to vacate grants, | 1727 |
| IX. PHOSPHATE BEDS. | 1728-1734 |
| Phosphate rock under navigable waters, when entered, | 1728 |
| How grant obtained; term; royalty, | 1729 |
| Exclusive right to mine; bound for royalty, | 1730 |
| Navigation not obstructed by grantee, | 1731 |
| Fees for issuing grant for phosphate beds, | 1732 |
| Failure to operate for two years vacates grant, | 1733 |
| May be mined without grant, how, | 1734 |
| GUARDIAN, | 1735—1797 |
| I. PUBLIC GUARDIANS, | 1735-1738 |
| How appointed; tenure, | 1735 |
| Oath of office, | 1736 |
| When letters issued to, | 1737 |
| Powers, duties, liabilities, compensation, | 1738 |
| II. APPOINTED BY PARENT, | 1739-1742 |
| Father, and if dead, mother may appoint, | 1739 |
| Effect of such appointment, | 1740 |
| Powers and liabilities of other guardians, | 1741 |
| Mother natural guardian, father dead, | 1742 |
| III. JURISDICTION OF CLERK OF SUPERIOR COURT OVER, | 1743-1753 |
| May appoint, for infants, idiots, lunatics and inebriates, | 1743 |
| May commit custody to one, estate to another, | 1744 |
| May allow yearly sum for support and education, | 1745 |

CAPTIONS.

GUARDIAN—Continued.

| | Sections. |
|--|-----------|
| What disbursements and commissions allowed, | 1746 |
| Appointed by, in case of divorce, | 1747 |
| May appoint when father is alive, | 1748 |
| Proceedings on application for, | 1749 |
| Must issue letters, | 1750 |
| Removed, when, | 1751 |
| Interlocutory orders, pending controversy, | 1752 |
| Resignation of; must first account, | 1753 |
| IV. BONDS, | 1754-1762 |
| Not to receive property till approved, | 1754 |
| Given before letters issued; increased if property sold, | 1755 |
| Recorded in clerk's office; injured person may sue on, | 1756 |
| One bond where wards have common property, | 1757 |
| Renewed every three years, | 1758 |
| Duty of clerk on failing to renew, | 1759 |
| Sureties relieved, | 1760 |
| Liability of clerk for taking insufficient, | 1761 |
| Liability of clerk for other defaults, | 1762 |
| V. POWERS AND DUTIES, | 1763-1774 |
| Must take charge of estate, | 1763 |
| Must sell perishable goods on order of clerk, | 1764 |
| Sales and rentings, how made, | 1765 |
| May lease lands, when, | 1766 |
| When timber may be sold, | 1767 |
| Plate and jewelry to be kept, | 1768 |
| Funds invested by fiduciaries, | 1769 |
| Deposit of trust funds, at fiduciaries' risk, | 1770 |
| Executor of deceased, pays money to clerk, | 1771 |
| When liable for debts, | 1772 |
| Liable for land sold for taxes, | 1773 |
| Liable for costs, when, | 1774 |
| VI. ESTATES SOLD, | 1775-1778 |
| By special proceeding; approved by judge, | 1775 |
| Property and fund held on same trusts, | 1776 |
| Sold to pay ward's debts, | 1777 |
| Proceeds assets for creditors; reached as against executors, | 1778 |
| VII. RETURNS AND ACCOUNTING, | 1779-1786 |
| First, within three months, | 1779 |
| Compelled by attachment, | 1780 |
| To be made of new assets, | 1781 |
| Annual accounts, | 1782 |
| Compelled by attachment and removal, | 1783 |
| Final account, | 1784 |
| Allowed reasonable disbursements and expenses, | 1785 |
| Commissions, | 1786 |
| VIII. ESTATE PROTECTED WHEN NO GUARDIAN, | 1787-1792 |
| Duty of grand jury relating to orphans; clerk to furnish it | |
| list of guardians, | 1787 |
| Solicitor to apply for receiver, when, | 1788 |
| Action brought by solicitor, | 1789 |
| Receiver appointed, | 1790 |
| Property obtained from receiver, | 1791 |
| Solicitor shall prosecute action, | 1792 |
| IX. FOREIGN GUARDIANS, | 1795-1797 |
| May have ward's estate removed, | 1795 |
| What petition must show, | 1796 |
| Who may be made defendants, | 1797 |

CAPTIONS.

| | Sections. |
|---|-----------|
| HABEAS CORPUS, | 1798—1840 |
| I. GENERALLY, | 1798—1799 |
| Cause of restraint of liberty enquired into, | 1798 |
| Habeas corpus shall not be suspended, | 1799 |
| II. THE APPLICATION, | 1800—1805 |
| Who may prosecute writ, | 1800 |
| When denied, | 1801 |
| By whom made, | 1802 |
| How and to whom, | 1803 |
| What it must state, | 1804 |
| When issued without, | 1805 |
| III. THE WRIT, | 1806—1808 |
| When granted, | 1806 |
| Penalty for refusal to grant, | 1807 |
| When sufficient, | 1808 |
| IV. THE RETURN, | 1809—1812 |
| When returnable, | 1809 |
| What to contain; when verified, | 1810 |
| Body produced, when, | 1811 |
| Served, how and by whom, | 1812 |
| V. OBEDIENCE COMPELLED, | 1813—1821 |
| Attachment for failure to obey, | 1813 |
| Penalty, judge refusing attachment, | 1814 |
| Sheriff attached, writ to coroner; penalty, | 1815 |
| Precept to bring up party detained, | 1816 |
| Penalty, judge refusing to grant precept, | 1817 |
| Penalty, judge conniving at insufficient return, | 1818 |
| Power of county to aid service, | 1819 |
| Obedience to order of discharge, compelled, | 1820 |
| Not liable civilly for obedience, | 1821 |
| VI. PROCEEDINGS AND JUDGMENT, | 1822—1831 |
| Notice to interested parties, | 1822 |
| Notice to solicitor, | 1823 |
| Witnesses subpoenaed, | 1824 |
| Facts examined into; proofs heard summarily, | 1825 |
| Party discharged, when, | 1826 |
| Party remanded, when, | 1827 |
| Party bailed or remanded, when, | 1828 |
| Party in execution not to be discharged on habeas corpus, | 1829 |
| Determined in absence of party, when, | 1830 |
| Penalty for committing for same cause, | 1831 |
| VII. CUSTODY OF CHILDREN, | 1832—1833 |
| Awarded by judge; modification of order, | 1832 |
| Appeal to supreme court, | 1833 |
| VIII. AD TESTIFICANDUM, | 1834—1840 |
| Courts of record may issue, | 1834 |
| Issued by justices and clerks, when, | 1835 |
| Application, what to contain, | 1836 |
| How and by whom served, | 1837 |
| Applicant to pay expenses and give bond, | 1838 |
| Duty of officer; penalty, | 1839 |
| Prisoner remanded, | 1840 |
| HUNTING, | 1841—1869 |
| I. AUDUBON SOCIETY, | 1841—1846 |
| Incorporated, | 1841 |
| Officers of, | 1842 |
| Objects for which created, | 1843 |
| Hunters' license, form of prescribed by, | 1844 |

CAPTIONS.

HUNTING—Continued.

| | Sections. |
|--|-----------|
| Grants certificates to take birds or eggs, | 1845 |
| Governor appoints treasurer of society and game wardens, | 1846 |
| II. GAME WARDENS, | 1847—1849 |
| Oath of; bond; badge; acts as constable, | 1847 |
| Powers, | 1848 |
| Birds seized by, sold, | 1849 |
| III. BIRD AND GAME FUND, | 1850 |
| How paid out, | 1850 |
| IV. NONRESIDENT HUNTERS, | 1851—1853 |
| Procure license, effect of, | 1851 |
| May take quail out of state, | 1852 |
| License, issued by clerk, | 1853 |
| V. GAME BIRDS, | 1854—1859 |
| What are, | 1854 |
| Birds kept as pets, or for breeding, | 1855 |
| License tax on clubhouses, Dare county, | 1856 |
| Nonresidents shooting from blinds or batteries in Dare county, south of Roanoke island, | 1857 |
| License tax on nonresidents in Dare county, | 1858 |
| License taxes for hunting wild fowl in Dare county, | 1859 |
| VI. CLOSE SEASON, | 1860—1869 |
| Deer, | 1860 |
| Squirrel, | 1861 |
| Opossum, | 1862 |
| Rabbit, | 1863 |
| Quail or partridges, | 1864 |
| Wild turkey, | 1865 |
| Dove, robin and lark, | 1866 |
| Pheasant, | 1867 |
| Woodcock, | 1868 |
| Snipe, | 1869 |
| IDIOTS, INEBRIATES AND LUNATICS, | 1870—1887 |
| I. GUARDIAN OF, | 1870—1875 |
| Inquisition; guardian appointed, | 1870 |
| Guardian appointed on certificate from hospital for insane, | 1871 |
| Inebriates defined, | 1872 |
| Reformation and restoration to sanity or sobriety, | 1873 |
| Estates without guardian managed by clerk, | 1874 |
| Allowance to abandoned feme covert lunatic, | 1875 |
| II. SALES OF ESTATES, | 1876—1878 |
| Clerk may order sale or renting, | 1876 |
| How and for what purpose sold; parties; disposition of proceeds, | 1877 |
| Land of wife of lunatic, how sold, | 1878 |
| III. SURPLUS INCOME, | 1879—1887 |
| When advanced to next of kin, | 1879 |
| For what purpose and to whom advanced, | 1880 |
| Distributees, parties, | 1881 |
| Advancements, equal; accounted for, when, | 1882 |
| Clerk may select those to advance, | 1883 |
| Secured against waste, | 1884 |
| Appeal; removal to superior court, | 1885 |
| Advancements only when insanity permanent, | 1886 |
| Decree suspended when sane, | 1887 |

CAPTIONS.

| | |
|--|-----------------------|
| INNKEEPERS, | Section. 1888—1893 |
| Must furnish accommodations, | 1888 |
| Liability for loss of baggage, | 1889 |
| Safe-keeping of valuables, | 1890 |
| Loss by fire, | 1891 |
| Copies of this chapter posted, | 1892 |
| Negligence of guest, | 1893 |
| INSOLVENT DEBTORS. | 1894—1928 |
| I. CRIMINAL ACTIONS, | 1894—1899 |
| Who may be discharged from prison, | 1894 |
| When petition filed, on whom served, | 1895 |
| Warrant issued for prisoner, | 1896 |
| Proceeding on application, | 1897 |
| Oath to be taken, | 1898 |
| Who may suggest fraud, | 1899 |
| II. CIVIL ACTIONS—UNDER ARREST, | 1900—1909 |
| Who entitled, | 1900 |
| When petition may be filed, | 1901 |
| The petition; verification, | 1902 |
| What notice given, and to whom, | 1903 |
| Who may suggest fraud, | 1904 |
| When no fraud suggested, debtor discharged, | 1905 |
| Cause continued, when, | 1906 |
| Issue of fraud, how debtor discharged, | 1907 |
| Fraud found; imprisoned, how, | 1908 |
| Effect of order of discharge, | 1909 |
| III. CIVIL ACTIONS—NOT UNDER ARREST, | 1910—1914 |
| May file petition, what to contain; how verified, | 1910 |
| Duty of clerk on receiving petition, | 1911 |
| Discharged, when, | 1912 |
| Order of discharge, terms and effect, | 1913 |
| Creditor may suggest, | 1914 |
| IV. GENERAL PROVISIONS, | 1915—1921 |
| Issue of fraud made up, cause docketed for trial, | 1915 |
| Debtor may give bond, | 1916 |
| Surety may surrender principal, | 1917 |
| When creditor liable for jail fees, | 1918 |
| False swearing, penalty, | 1919 |
| General power of trustees, | 1920 |
| Who may take jail bounds, | 1921 |
| V. UNDER SENTENCE, | 1922—1928 |
| Confined in jail or penitentiary. who may apply for trustee, | 1922 |
| To whom application made when trustee appointed, | 1923 |
| Duty of trustee, | 1924 |
| Trustee to make returns, | 1925 |
| Oath of trustee, | 1926 |
| May appoint several trustees, | 1927 |
| Court may remove trustee and appoint successor, | 1928 |
| INSPECTION, | 1929 |
| Lumber inspectors, for certain counties, | 1929 |
| INTEREST, | 1930—1936 |
| Rate of, six per cent., | 1930 |
| Penalty for usury; corporate bonds sold below par, | 1931 |
| Time from which it runs, | 1932 |
| Guardian notes bear compound, | 1933 |

CAPTIONS.

INTEREST—*Continued.*

Sections.

| | |
|---|------|
| Contracts, except penal bonds, and judgments to bear; jury to distinguish principal from, | 1934 |
| After verdict or report, computed by clerk, | 1935 |
| Judgment by default final, clerk ascertains, | 1936 |

JURORS,

1937—1961

I. HOW SELECTED,

1937—1943

| | |
|---------------------------------------|------|
| List made by county commissioners, | 1937 |
| Names put in boxes, | 1938 |
| Drawn from box, how, | 1939 |
| Jurors with suits pending, | 1940 |
| When disqualified persons are drawn, | 1941 |
| How drawing to continue, | 1942 |
| When commissioners fail to draw jury, | 1943 |

II. PETIT JURORS AND TALESMEN,

1944—1947

| | |
|--|------|
| Peremptory challenges, | 1944 |
| Sworn; judge decides competency, | 1945 |
| Tales jurors summoned; qualifications, | 1946 |
| Judge to appoint one to summon tales jurors, sheriff interested, | 1947 |

III. GRAND JURORS,

1948—1952

| | |
|----------------------------------|------|
| How drawn, | 1948 |
| Not drawn at special term, | 1949 |
| Exceptions to, when taken, | 1950 |
| Foreman may administer oaths, | 1951 |
| Must visit jail and county home, | 1952 |

IV. SPECIAL VENIRE,

1953—1955

| | |
|--|------|
| Ordered; summoned, | 1953 |
| Drawn from box, when, | 1954 |
| Penalty on sheriff not executing; on jurors not attending, | 1955 |

V. GENERAL PROVISIONS,

1956—1961

| | |
|---|------|
| Summoned and must attend until discharged, | 1956 |
| Penalty for nonattendance, regular and tales, | 1957 |
| Furnished with accommodations, | 1958 |
| Exempt from civil arrest, | 1959 |
| Exemptions from jury duty, | 1960 |
| Clerk to keep record of jurors, | 1961 |

LANDLORD AND TENANT,

1962—1991

I. THE RELATION,

1962—1965

| | |
|---|------|
| Lessors and lessees, not partners, | 1962 |
| Forfeiture without demand for rent, when, | 1963 |
| Length of notice to quit, | 1964 |
| Agreement to repair, how construed, | 1965 |

II. THE LESSOR,

1966—1969

| | |
|---|------|
| Recovers for use, when, | 1966 |
| Rent apportioned, estate terminated, | 1967 |
| Rents and charges apportioned to successive owners, | 1968 |
| Grantees of reversion, same rights and liabilities as grantors, | 1969 |

III. THE LESSEE,

1970—1972

| | |
|---|------|
| Holds to end of farming year, | 1970 |
| Not liable for accidental damage, | 1971 |
| May surrender, building destroyed or damaged, | 1972 |

IV. AGRICULTURAL TENANCIES,

1973—1980

| | |
|--|------|
| Landlord's lien, crop vested in to secure, how enforced, | 1973 |
| Rights of tenant, | 1974 |
| Action on the control; tenant's undertaking, | 1975 |
| Crops delivered to landlord; undertaking, | 1976 |
| If neither gives undertaking, crops sold, | 1977 |
| Tenant's crop not subject to execution against landlord, | 1978 |

CAPTIONS.

| | |
|---|-----------|
| LANDLORD AND TENANT— <i>Continued.</i> | Sections. |
| Turpentine and lightwood leases, | 1979 |
| Mining and timber land leases, | 1980 |
| V. SUMMARY EJECTMENT, | 1981—1990 |
| Tenant dispossessed, when, | 1981 |
| Summons issues by justice on verified complaint, | 1982 |
| Service of summons, | 1983 |
| Judgment by default or confession, | 1984 |
| Trial by justice; jury trial; judgment; execution, | 1985 |
| Damages assessed to time of trial, | 1986 |
| Rent and cost tendered by tenant, | 1987 |
| Appeal; undertaking on; increase of, | 1988 |
| Restitution, when, | 1989 |
| Damages to tenant for wrongful removal, | 1990 |
| VI. FORMS, | 1991 |
| Forms, | 1991 |
| LIBEL AND SLANDER, | 1992—1995 |
| Notice to newspaper before action, | 1992 |
| Good faith and correction, actual damages recovered; nominal fine, | 1993 |
| Anonymous communications, | 1994 |
| Slander of women, | 1995 |
| LIENS, | 1996—2037 |
| I. LABOR AND MATERIALS, | 1996—1998 |
| On buildings and other property, | 1996 |
| Personal property repaired, | 1997 |
| Constructing railroad; claims collected; time for action, | 1998 |
| II. SUBCONTRACTORS, | 1999—2003 |
| Given preferred lien, | 1999 |
| Notice to owner; liability of, | 2000 |
| Contractor shall furnish owner with statement of indebtedness; subcontractor may, | 2001 |
| Sums due by statement, a lien, | 2002 |
| Claims paid pro rata, when, | 2003 |
| III. ON COLTS AND CALVES, | 2004—2005 |
| Season of sire a lien on, | 2004 |
| Not exempt from execution, | 2005 |
| IV. PROCEEDINGS TO ENFORCE, | 2006—2011 |
| Claims filed, when, | 2006 |
| Action brought, when and where, | 2007 |
| Filed in twelve months, | 2008 |
| Execution, | 2009 |
| No justice's execution against land, | 2010 |
| Attachment, remedy, when, | 2011 |
| V. RIGHTS OF DEFENDANT, | 2012—2013 |
| Setoff and counterclaim, | 2012 |
| How liens discharged, | 2013 |
| VI. PRIORITIES, | 2014—2016 |
| Laborer's lien on crops, | 2014 |
| Date from notice of lien, | 2015 |
| Rights not affected, | 2016 |
| VII. HOTELS, | 2017—2019 |
| May retain baggage, when; lien on. | 2017 |
| Baggage sold, when, | 2018 |
| Notice of sale, | 2019 |
| VIII. ON VESSELS, | 2020—2031 |
| For towage, | 2020 |
| For labor in loading and unloading, | 2021 |

CAPTIONS.

| | |
|--|-----------|
| LIENS— <i>Continued.</i> | Sections. |
| How filed; notice to master, | 2022 |
| How enforced, | 2023 |
| Judgment against contractor, a judgment against master and vessel, | 2024 |
| Liens not to exceed amount due contractor, | 2025 |
| Owner to see laborers paid, | 2026 |
| May refuse settlement with contractor till laborers paid, | 2027 |
| Owner may pay orders for wages, | 2028 |
| Laborers may sue owner, when, | 2029 |
| Contractors for loading vessels licensed, | 2030 |
| Tax and bond, | 2031 |
| IX. AGRICULTURAL LIENS, | 2032—2037 |
| On crops for advances, | 2032 |
| Lien created by mortgagors in possession, | 2033 |
| Crops seized and sold, when; issue made up for trial, | 2034 |
| Short form in certain counties, | 2035 |
| Rights on failure to cultivate crops, | 2036 |
| Commissioners to furnish blank records, | 2037 |
| LIQUORS, | 2038—2059 |
| I. MANUFACTURE, | 2038—2039 |
| Place, | 2038 |
| Wine and cider from fruits, | 2039 |
| II. LICENSE, | 2040—2046 |
| Necessary, | 2040 |
| Issued to druggists outside of towns, | 2041 |
| Application for, | 2042 |
| Hearing, and order for, | 2043 |
| Form and issuing, | 2044 |
| Posted in place of business, | 2045 |
| Revoked, | 2046 |
| III. LOCAL OPTION ELECTIONS, | 2047—2051 |
| When ordered, what submitted, | 2047 |
| How conducted, | 2048 |
| Boxes provided, what tickets voted. | 2049 |
| Distilleries, when allowed, | 2050 |
| Saloons, when licensed, | 2051 |
| IV. DISPENSARIES, | 2052—2057 |
| When established, | 2052 |
| Commissioners appointed. | 2053 |
| Terms of office fixed; removal; bonds, | 2054 |
| Sales in, how made, | 2055 |
| Unlawful to sell except in dispensary, | 2056 |
| Proceeds disposed of, | 2057 |
| V. SPECIAL ACTS, | 2058—2059 |
| Not repealed, | 2058 |
| Place of delivery, place of sale, | 2059 |
| MARRIAGE, | 2160—2071 |
| I. HOW CONTRACTED, | 2060 |
| What constitutes, | 2060 |
| II. CONTRACTING PARTIES, | 2061—2064 |
| Who may marry, | 2061 |
| Who may not marry. | 2062 |
| Prohibited degrees of kinship, | 2063 |
| Marriages between slaves validated. | 2064 |
| III. THE LICENSE, | 2065—2071 |
| Unlawful to perform ceremony without, | 2065 |
| Penalty for performing ceremony without, | 2066 |

CAPTIONS.

| | |
|---|-----------|
| MARRIAGE— <i>Continued.</i> | Sections. |
| Issued by register of deeds, | 2067 |
| Form of license, | 2068 |
| Penalty for issuing unlawfully, | 2069 |
| Record of, kept by register of deeds; original filed, | 2070 |
| Penalty for failure to record licenses and the return, | 2071 |
| MARRIED WOMEN, | 2072—2095 |
| I. SEPARATE ESTATE OF, | 2072—2079 |
| Secured; disposed of by will; conveyed with husband's written assent, | 2072 |
| Can not contract without husband's consent, | 2073 |
| May draw checks, | 2074 |
| What leases require joinder of husband and privy examination, | 2075 |
| Land of not sold or leased without their consent; husband's interest exempt from execution, | 2076 |
| May make a will, | 2077 |
| Separate savings; husband's liability for use of, | 2078 |
| Liable for ante-nuptial debts, | 2079 |
| II. RIGHTS AND LIABILITIES OF HUSBAND, | 2080—2084 |
| Tenant by the courtesy, when, | 2080 |
| Party to action against wife; may defend, | 2081 |
| Discharged from defense, when: pays cost, | 2082 |
| Jointly liable for wife's torts, | 2083 |
| Not liable for ante-nuptial debts, | 2084 |
| III. CONTRACTS BETWEEN HUSBAND AND WIFE, | 2085—2086 |
| Void without approval of probating officer, | 2085 |
| When valid, | 2086 |
| IV. DIVORCE AND SEPARATION, | 2087—2089 |
| Property rights after divorce a vinculo, | 2087 |
| Effects of elopement, | 2088 |
| Effects of husband living in adultery, | 2089 |
| V. FREE TRADERS, | 2090—2095 |
| How created, | 2090 |
| Dates from registration, | 2091 |
| Certified copy evidence, | 2092 |
| How ended; publication, | 2093 |
| Living separate from husband; husband idiot or lunatic, | 2094 |
| Abandoned by husband, | 2095 |
| MILLS, | 2096—2112 |
| I. PUBLIC, | 2096—2098 |
| What are, | 2096 |
| Grind according to turn; toll taken, | 2097 |
| Measure kept, toll by weight, | 2098 |
| II. WATER MILLS ESTABLISHED, | 2099—2107 |
| Procedure, | 2099 |
| Commissioners appointed, how, | 2100 |
| What commissioner presides; penalty for failure to perform duty, | 2101 |
| Duty of commissioners, | 2102 |
| Report contains, what, | 2103 |
| When mill not allowed, | 2104 |
| Power of court on return of report, | 2105 |
| Built, when; kept up, | 2106 |
| Time in which must be rebuilt, | 2107 |
| III. DAMAGES, | 2108—2112 |
| For erection of mills, procedure, | 2108 |
| Dams, when abated as nuisances, | 2109 |

CAPTIONS.

MILLS—Continued.

Sections.

| | |
|--|------|
| Judgment binding five years, when, | 2110 |
| Judgment binding one year, when, | 2111 |
| Judgment against plaintiff; costs, how paid, | 2112 |

NAMES OF PERSONS,

2113—2117

| | |
|---|------|
| Can not be altered by legislature, | 2113 |
| Application to alter before clerk superior court; notice, | 2114 |
| Proof of good character, filed, | 2115 |
| Change ordered by clerk, | 2116 |
| Clerk to issue certificate; record made, | 2117 |

NAVIGATION,

2118—2161

I. CAPE FEAR RIVER,

2118—2138

| | |
|---|------|
| Commissioners of navigation, how elected, | 2118 |
| Powers and duties of commissioners, | 2119 |
| Jurisdiction of commissioners as a court, | 2120 |
| Stay of execution not allowed; parties may appeal, | 2121 |
| Harbor-master of Wilmington; duties, | 2122 |
| Port wardens, how and when elected; oath of office, | 2123 |
| Duties and fees of port wardens of Wilmington, | 2124 |
| Pilots, how appointed; number, | 2125 |
| Class of license granted pilots, | 2126 |
| Rates attached to commission to pilots, | 2127 |
| Number of pilots regulated, | 2128 |
| Apprentice not to act as pilot, | 2129 |
| Number of boats fixed; commanded by licensed pilot, | 2130 |
| Rights of pilots to go over any bar, | 2131 |
| Penalty on pilots not attending when requested, | 2132 |
| Rates of pilotage, | 2133 |
| Pilot entitled to full pay when refused, | 2134 |
| When vessel pays one-third pilotage, | 2135 |
| Pilots may run regularly on steamers, | 2136 |
| When vessel need not take a pilot, | 2137 |
| Pilotage when vessel deepened or lightened, | 2138 |

II. PILOTS, HATTERAS AND OCRACOCKE,

2139—2141

| | |
|--|------|
| Commissioners of navigation for Hatteras and Ocracoke; du- | |
| ties; oaths, | 2139 |
| Rates of pilotage, | 2140 |
| Who may be pilots for Hatteras and Ocracoke inlets, | 2141 |

III. PILOTS, BEAUFORT HARBOR,

2142—2148

| | |
|---|------|
| Commissioners of navigation, how elected, | 2142 |
| Authority of Commissioners, | 2143 |
| Harbor-master for Beaufort, | 2144 |
| Pilots, how appointed and licensed, | 2145 |
| Fees for issuing pilot's license, | 2146 |
| Rates of pilotage, | 2147 |
| Vessel under sixty tons not liable for pilot. | 2148 |

IV. PILOTS, BOGUE INLET,

2149—2150

| | |
|--|------|
| Commissioners of navigation for Bogue inlet, | 2149 |
| Rates of pilotage, | 2150 |

V. PILOTS, GENERAL PROVISIONS,

2151—2161

| | |
|--|------|
| Pilots to have spyglasses, | 2151 |
| Penalty for acting as pilot without license, | 2152 |
| Penalty on pilot neglecting to go to vessel having signal set, | 2153 |
| Pilots may be removed, | 2154 |
| Pay for detention; when driven off coast, | 2155 |
| Pilots refused, entitled to pay, | 2156 |
| Pay of pilots when detained by vessel, | 2157 |
| Rates of pilotage annexed to commission, | 2158 |

CAPTIONS.

| | | |
|---|--|----------------------|
| NAVIGATION—Continued. | | Sections. |
| Harbor-master, how appointed, | | 2159 |
| Commissioners of navigation to designate place where trash may be put, | | 2160 |
| Harbor-master, how appointed where no board of navigation, | | 2161 |
| NEGOTIABLE INSTRUMENTS, | | 2162—2356 |
| I. REQUIREMENTS FOR NEGOTIABILITY, | | 2162—2171 |
| What to contain, | | 2162 |
| What constitutes a sum certain, | | 2163 |
| What promise unconditional, | | 2164 |
| Additional promise makes non-negotiable; exceptions, | | 2165 |
| Things which do not affect, | | 2166 |
| What is a determinable future time, | | 2167 |
| When payable on demand, | | 2168 |
| What are payable to order, | | 2169 |
| What are payable to bearer, | | 2170 |
| No formal language required, | | 2171 |
| II. DATE, | | 2172—2174 |
| Prima facie true, | | 2172 |
| Incorrect, does not invalidate, | | 2173 |
| Holder may insert, | | 2174 |
| III. INCOMPLETE, | | 2175—2177 |
| Blanks may be filled by holder, | | 2175 |
| Not valid unless delivered, | | 2176 |
| Revocable until delivery, | | 2177 |
| IV. SIGNATURE, | | 2178—2182 |
| No liability without, | | 2178 |
| May be made by agent, | | 2179 |
| Effect of signing as agent, | | 2180 |
| Effect of, by procuration, | | 2181 |
| Forgery of, renders wholly inoperative, | | 2182 |
| V. CONSIDERATION, | | 2183—2188 |
| Valuable, presumed, | | 2183 |
| What constitutes value, | | 2184 |
| Holder deemed holder for value when value given, | | 2185 |
| Holder of lien, holder for value to extent of lien, | | 2186 |
| Absence or failure of, as defense, | | 2187 |
| Accommodation party, who is; liability, | | 2188 |
| VI. INDORSEMENT, | | 2189—2210 |
| What is negotiation, | | 2189 |
| How made, | | 2190 |
| Effect of, by corporations and infants, | | 2191 |
| Must be of entire instrument, | | 2192 |
| Kinds of, | | 2193 |
| Special defined; in blank, | | 2194 |
| Holder may convert blank to special, | | 2195 |
| Restrictive, defined, | | 2196 |
| Restrictive, confers what rights, | | 2197 |
| Qualified, constitutes indorser a mere assignor of title, | | 2198 |
| Conditional, effect of, | | 2199 |
| Effect of special, instrument payable to bearer, | | 2200 |
| By two or more payees, | | 2201 |
| Payable to cashier or other fiscal officer, payable to corporation, | | 2202 |
| Name of payee wrong, how indorsed, | | 2203 |
| Indorser in representative capacity may negative personal lia- bility, | | 2204 |
| Undated, presumed, before due, | | 2205 |
| Presumed made at place of date of instrument, | | 2206 |
| Once negotiable, continues so till discharged, | | 2207 |

CAPTIONS.

NEGOTIABLE INSTRUMENTS—*Continued.*

| | Sections. |
|--|-----------|
| Holder may strike out; effect of, | 2208 |
| Transfer without, makes non-negotiable till indorsed, | 2209 |
| Negotiations back to prior party releases intermediate parties, | 2210 |
| VII. RIGHTS OF HOLDER, | 2211—2219 |
| May sue in his own name, | 2211 |
| What constitutes holder in due course, | 2212 |
| Delay in presenting when on demand, | 2213 |
| Effect of notice of infirmity, | 2214 |
| Fraud, duress, or force in obtaining, makes title void, | 2215 |
| Actual knowledge necessary to constitute notice of infirmity, | 2216 |
| Free from defect, in title in prior parties, | 2217 |
| Holds as non-negotiable, when, | 2218 |
| Deemed prima facie in due course, | 2219 |
| VIII. LIABILITY OF PARTIES, | 2220—2229 |
| Maker's admissions and engagements, | 2220 |
| Drawer's admissions and engagements, | 2221 |
| Acceptor's engagements, | 2222 |
| Who deemed indorsers, | 2223 |
| Signing in blank, liable as indorser, | 2224 |
| Delivery or qualified indorsement warrants what, | 2225 |
| Indorser without qualification warrants what, | 2226 |
| Indorser of instrument negotiable by delivery, | 2227 |
| In order of their indorsement, | 2228 |
| Broker or agent negotiating without indorsement, | 2229 |
| IX. PRESENTMENT FOR PAYMENT, | 2230—2249 |
| When necessary; when not, | 2230 |
| At what time, | 2231 |
| How made, | 2232 |
| Proper place for, | 2233 |
| Instrument exhibited to party, delivered when paid, | 2234 |
| Payable at bank, how made, | 2235 |
| When made to personal representative, | 2236 |
| How made to partners, | 2237 |
| To persons severally liable, | 2238 |
| When not required to charge drawer, | 2239 |
| Not required to charge indorser, when, | 2240 |
| Delay in making, when excused, | 2241 |
| Dispensed with, when, | 2242 |
| What constitutes, | 2243 |
| Dishonor gives right of action against those secondarily liable, | 2244 |
| When negotiable instruments payable, | 2245 |
| Days of grace, what allowed, | 2246 |
| Time, how computed, | 2247 |
| Instrument payable at bank is an order to bank to pay, | 2248 |
| Payment in due course, what is, | 2249 |
| X. NOTICE OF DISHONOR, | 2250—2279 |
| Effect of failure to give, | 2250 |
| By whom given, | 2251 |
| May be given by agent, | 2252 |
| Who benefited by holder's notice, | 2253 |
| Given by a party inures to benefit of holder and subsequent parties, | 2254 |
| Agent may give to principal or parties, | 2255 |
| Defects of, not to invalidate unless party misled, | 2256 |
| Terms of, may be oral or written, | 2257 |
| May be given to party or agent, | 2258 |
| When given to personal representative, | 2259 |
| To partner for firm, | 2260 |
| Joint parties, each notified, | 2261 |
| To trustee in bankruptcy, etc., | 2262 |

CAPTIONS.

| NEGOTIABLE INSTRUMENTS— <i>Continued.</i> | Sections. |
|---|---------------|
| At what time given, | 2263 |
| When given to persons residing in same place, | 2264 |
| When given by mail, | 2265 |
| Duly mailed, deemed given, | 2266 |
| When deemed mailed, | 2267 |
| When given to antecedent parties, | 2268 |
| Where to be sent, | 2269 |
| May be waived, | 2270 |
| Waiver embodied in instrument binds all parties, | 2271 |
| Unnecessary when protest waived, | 2272 |
| Dispensed with, when, | 2273 |
| Delay in giving, excused, when, | 2274 |
| Not required, when, | 2275 |
| To indorser, not required, when, | 2276 |
| Notice of nonacceptance makes unnecessary, | 2277 |
| Effect of failure to give notice of nonacceptance, | 2278 |
| Protest not required, except of foreign bills of exchange, | 2279 |
| XI. DISCHARGE OF, | 2280—2286 |
| What constitutes, | 2280 |
| When one secondarily liable discharged, | 2281 |
| Payment by party secondarily liable is not, | 2282 |
| Holder may renounce in writing his rights against any party, | 2283 |
| Cancellation by mistake inoperative, | 2284 |
| Material alteration without assent avoids, | 2285 |
| Material alteration defined, | 2286 |
| XII. BILLS, FORM AND INTERPRETATION, | 2287—2292 |
| Bills defined, | 2287 |
| Not assignment of fund, | 2288 |
| May be addressed to two or more drawees jointly but not in alternative, | 2289 |
| Inland bill defined, | 2290 |
| When holder may treat as bill or note, | 2291 |
| Referee in case of need, | 2292 |
| XIII. ACCEPTANCE, | 2293—2303 |
| Defined, | 2293 |
| Must be written on bill, | 2294 |
| Effect of, on paper other than bill, | 2295 |
| Unconditional promise in writing to accept valid, when, | 2296 |
| Twenty-four hours allowed drawee to accept, | 2297 |
| Destruction of, or failure to return bill deemed acceptance, | 2298 |
| May be accepted before signed, when overdue, etc., | 2299 |
| Generally and qualified, | 2300 |
| What is general, | 2301 |
| What is qualified, | 2302 |
| Holder may refuse qualified acceptance and treat bill as dis- honored, | 2303 |
| XIV. PRESENTMENT FOR ACCEPTANCE, | 2304—2312 |
| Necessary, in what cases, | 2304 |
| Failure to present in reasonable time discharges drawee and indorsers, | 2305 |
| How made, | 2306 |
| On what day presented, | 2307 |
| Excused, when; can not be made before due, | 2308 |
| Excused and bill treated as dishonored, | 2309 |
| When bill dishonored by nonacceptance, | 2310 |
| When bill must be treated as dishonored, | 2311 |
| Bill dishonored by nonacceptance, holder has recourse on drawer and indorsers, | 2312 |

CAPTIONS.

NEGOTIABLE INSTRUMENTS—*Continued.*

| | Sections. |
|--|-----------|
| XV. PROTEST, | 2313—2321 |
| Necessary only on foreign bills, | 2313 |
| Annexed to bill, specifies what, | 2314 |
| By whom made, | 2315 |
| Must be made on day of dishonor, | 2316 |
| At what place made, | 2317 |
| For nonpayment, after, for nonacceptance, | 2318 |
| Before maturity, in bankruptcy, etc., | 2319 |
| Dispensed with, when, | 2320 |
| On copy of lost bill, | 2321 |
| XVI. ACCEPTANCE FOR HONOR, | 2322—2331 |
| When may be made, | 2322 |
| How made, | 2323 |
| Deemed for honor of drawer, | 2324 |
| Liability on, | 2325 |
| Liable, when, | 2326 |
| Maturity, how calculated, | 2327 |
| Protest before presentment to acceptor, | 2328 |
| How presented for payment, | 2329 |
| Delay in presenting to acceptor for honor or referee in case of need excused, when, | 2330 |
| Protest when not paid by acceptor, | 2331 |
| XVII. PAYMENT FOR HONOR, | 2332—2338 |
| After protest, | 2332 |
| Must be attested by notarial act of honor, | 2333 |
| Notarial act of honor, on what founded, | 2334 |
| Who given preference in, | 2335 |
| Discharges all subsequent parties, | 2336 |
| Refusing payment forfeits rights, | 2337 |
| Payer for honor entitled to bill and protest, | 2338 |
| XVIII. BILLS IN A SET, | 2339—2344 |
| Constitute one bill, | 2339 |
| Two or more parts negotiated, holder whose title first accrues owner, | 2340 |
| Indorser liable for all he indorses, | 2341 |
| Acceptor liable for all he accepts, | 2342 |
| Payment of part does not release from outstanding accepted part, | 2343 |
| Payment of one part discharges whole, when, | 2344 |
| XIX. PROMISSORY NOTES AND CHECKS, | 2345—2350 |
| Negotiable promissory note defined, | 2345 |
| Check defined, law governing, | 2346 |
| Failure to present in reasonable time discharges drawer, | 2347 |
| Certification of check an acceptance, | 2348 |
| Certification discharges drawer and indorsers, | 2349 |
| Check not assignment of funds, | 2350 |
| XX. GENERAL PROVISIONS, | 2351—2356 |
| Terms defined, | 2351 |
| Rules of construction, | 2352 |
| Who primarily and secondarily liable, | 2353 |
| Reasonable time determined by usage, | 2354 |
| Law merchant applicable, | 2355 |
| This chapter not to authorize certain things, | 2356 |
| NOTARIES, | 2357—2363 |
| Appointed by governor; qualified before clerk, | 2357 |
| Commission; record of qualification by clerk, | 2358 |
| Clerks notaries ex officio; may certify own seals, | 2359 |

CAPTIONS.

| | | |
|---|--|------------------|
| NOTARIES—Continued. | | Sections. |
| May take probates, administer oaths, etc., | | 2360 |
| May exercise power in other than own county, | | 2361 |
| Must state expiration of commission, | | 2362 |
| Seal, | | 2363 |
| OATHS, | | 2364—2374 |
| Oaths administered with solemnity, | | 2364 |
| How administered, | | 2365 |
| Who may be sworn with uplifted hand; form of affirmation, | | 2366 |
| How Quakers, Moravians, etc., affirm, | | 2367 |
| Oaths to support constitution of United States; form of; all officers to take, | | 2368 |
| Oath or affirmation to support constitution; form of; taken by all officers, | | 2369 |
| When deputies may administer, | | 2370 |
| Oaths of sundry persons, forms of, | | 2371 |
| County surveyors and deputies may administer oaths, when, | | 2372 |
| Administered by certain officers, | | 2373 |
| Certain oaths validated, | | 2374 |
| OFFICERS, | | 2375—2379 |
| No person shall hold more than one office, | | 2375 |
| Penalty for holding office contrary to constitution, | | 2376 |
| Bargains made for office void, | | 2377 |
| Must take oath before acting; penalty for failure, | | 2378 |
| Persons holding, deemed doing so lawfully; hold until their successors are qualified, | | 2379 |
| OYSTERS AND FISH, | | 2380—2485 |
| I. TERRAPIN, | | 2380—2381 |
| Use of drag nets by nonresidents for catching terrapin forbidden, | | 2380 |
| Diamond-back terrapin protected, | | 2381 |
| II. OYSTER BEDS, | | 2382—2392 |
| Natural, defined, | | 2382 |
| Planted in certain territory, | | 2383 |
| How license is obtained, | | 2384 |
| County commissioners to cause survey to be made, | | 2385 |
| Under control of the state, | | 2386 |
| How beds entered, | | 2387 |
| Secretary of state to issue grant; amount granted limited, | | 2388 |
| Price paid for franchise, | | 2389 |
| Liable to taxation, | | 2390 |
| Books of records of grants kept, | | 2391 |
| Form of grants approved by attorney general, | | 2392 |
| III. CATCHING OYSTERS, | | 2393—2413 |
| Close season, exception, | | 2393 |
| At night or on Sunday, | | 2394 |
| Illegal dredging, | | 2395 |
| Catching oysters without license, | | 2396 |
| Using boats not licensed, | | 2397 |
| Displaying false number on boat, | | 2398 |
| Failure to stop and show oyster license, | | 2399 |
| False statement in application for oysterman's license, | | 2400 |
| Dredging in prohibited waters, | | 2401 |
| Selling oysters not culled, | | 2402 |
| Oysters where purchased to be carried out of the state, | | 2403 |
| Unloading oysters on Sunday or at night, | | 2404 |
| Dealing in oysters without license, | | 2405 |

CAPTIONS.

OYSTERS AND FISH—Continued.

| | Sections. |
|--|-----------|
| Dealer failing to keep record, | 2406 |
| Oyster shells not carried out of state; vessel seized, when, | 2407 |
| Evidence of illegal dredging, | 2408 |
| Arrests without warrant, when and how made, | 2409 |
| Using illegal measure for oysters, | 2410 |
| Catching oysters for lime, | 2411 |
| Larceny of oysters on private beds, | 2412 |
| Oysters caught at night; injury to private beds, | 2413 |
| IV. OYSTER INDUSTRY REGULATED, | 2414—2433 |
| Commissioner and assistant, how appointed, removed; term; | |
| salary; bond; oath of office, | 2414 |
| Inspectors, how appointed; term; salary; bond; oath of office, | 2415 |
| Duties of the oyster commissioner, | 2416 |
| Duties of the assistant commissioner, | 2417 |
| Duties of inspectors, | 2418 |
| Who may be licensed to catch oysters, | 2419 |
| How license obtained to catch oysters; who may issue; form of, | 2420 |
| License for boat used in catching oysters, | 2421 |
| License to oyster dealers, | 2422 |
| Clerk superior courts to report licenses monthly, | 2423 |
| Dredging, when allowed; prohibited territory, | 2424 |
| Governor may suspend right to dredge, | 2425 |
| Oysters culled on grounds, | 2426 |
| Oysters not culled seized and put on public grounds, | 2427 |
| Dimensions of oyster measure, | 2428 |
| Dealers to keep records, | 2429 |
| Purchase tax, | 2430 |
| Vessels with oysters, when allowed to go through canals, | 2431 |
| Shells scattered on oyster beds, | 2432 |
| Oyster funds kept separate, how paid out, | 2433 |
| V. CLAMS, | 2434 |
| Clams, | 2434 |
| VI. FISHING, | 2435—2485 |
| Croatan marshes, | 2435 |
| Masonboro and Myrtle Grove sound, | 2436 |
| Catching oysters in Myrtle Grove sound, | 2437 |
| Lay days for Pamlico river, | 2438 |
| Fishing dutch nets in Pamlico and Tar rivers, | 2439 |
| Dutch nets in Pamlico river, | 2440 |
| Direction of nets in Pamlico sound, | 2441 |
| In Carteret county, | 2442 |
| Dutch nets in Carteret county, | 2443 |
| Obstructions in Carteret county, | 2444 |
| Mullets and menhaden in Carteret, | 2445 |
| Dutch nets in Albemarle sound and its tributaries, | 2446 |
| Perquimans river, | 2447 |
| Pasquotank county, | 2448 |
| Obstructions in Little river, | 2449 |
| Fish offal not thrown in navigable waters, | 2450 |
| Scuppernong river, | 2451 |
| Drift nets in the sounds, | 2452 |
| Frying Pan creek, Tyrrell county, | 2453 |
| Net stakes removed from certain waters, | 2454 |
| Dutch nets at the inlets, | 2455 |
| Anchor nets in Albemarle sound, | 2456 |
| Pamlico county, | 2457 |
| Dutch nets in Neuse river, | 2458 |
| Size of meshes for seines in Neuse and Trent rivers, | 2459 |
| Fishing in Trent river, | 2460 |
| Fishing or shooting on bridges across Neuse or Trent river at New Bern, | 2461 |

CAPTIONS.

| OYSTERS AND FISH— <i>Continued.</i> | Sections. |
|---|---------------|
| Setting nets across streams, | 2462 |
| Hauling seines, Cherokee county, | 2463 |
| License tax on nonresidents fishing with seines, | 2464 |
| Right to fisheries, | 2465 |
| Obstruction of fish in Hiawassee river, | 2466 |
| Regulated in certain streams, | 2467 |
| Sluice-ways kept open when constructed, | 2468 |
| Obstructions removed, | 2469 |
| Vessel injuring nets, | 2470 |
| Use of dynamite for killing fish, | 2471 |
| When nonresident may use seines, | 2472 |
| In New Hanover county, | 2473 |
| Northeast Cape Fear, | 2474 |
| In Brunswick, New Hanover and Pender counties, | 2475 |
| In Black river and Mingo creek, | 2476 |
| In certain streams in Cumberland, New Hanover, Brunswick and Sampson counties, | 2477 |
| Obstruction in South Fork river, | 2478 |
| Obstruction in Neuse river, | 2479 |
| Regulated in Lumber river, | 2480 |
| Fishways to be erected in Haw river, | 2481 |
| Regulated in Nantahala river, | 2482 |
| Robbing nets, | 2483 |
| Obstructions in certain streams in Henderson county, | 2484 |
| Trout in Cataloochee creek, Haywood county, | 2485 |
| PARTITION, | 2486—2518 |
| I. PROCEDURE, | 2486—2497 |
| As in special proceedings, | 2486 |
| Venue, | 2487 |
| Petition filed; commissioners appointed, | 2488 |
| Unknown person interested, representative appointed, | 2489 |
| How commissioners summoned; their duty, | 2490 |
| Oath of commissioners, | 2491 |
| Commissioners may employ surveyor, | 2492 |
| Report; contents; impeached, when, | 2493 |
| Confirmation; effect: where registered, | 2494 |
| Owely bears interest, | 2495 |
| Owely charged against minors, when payable, | 2496 |
| Delay by commissioner, | 2497 |
| II. LANDS IN TWO STATES, | 2498—2502 |
| Procedure, | 2498 |
| When court may decree partition, | 2499 |
| Commissioners appointed, when; their duty: final decree; deed compelled: effect of decree, | 2500 |
| When decree of another state enforced, | 2501 |
| Decree in another state, how validity passed on, | 2502 |
| II. PERSONAL PROPERTY, | 2503—2504 |
| How made, | 2503 |
| Commissioners to report: exceptions: confirmation, | 2504 |
| IV. SALE OF LAND, | 2506—2515 |
| Part sold and part divided, | 2506 |
| Expectancy may be sold, | 2507 |
| Life tenant and remainderman may sell; life estate valued, | 2508 |
| Timber trees may be sold; life tenant's estate valued, | 2509 |
| Disputed ownership of one share; sale ordered, and ownership reserved, | 2510 |
| When sale ordered: terms, | 2511 |
| Who may sell; confirmation; impeaching, | 2512 |
| How sale advertised, | 2513 |

CAPTIONS.

| | | |
|--------------------------------|---|------------------|
| PARTITION—Continued. | | Sections. |
| | Confirmation of report in sale for division, | 2513a |
| | How proceeds of sale secured to infants, etc., | 2514 |
| | Land partitioned or sold, subject to dower; dower sold, | 2515 |
| V. SALE, PUBLIC USE, | | 2516 |
| | Land required for public use, how sold, | 2516 |
| VI. SALE OF PERSONALTY, | | 2517—2518 |
| | When ordered; how made, | 2517 |
| | How sale advertised; terms, | 2518 |
| PARTNERSHIP, | | 2519—2545 |
| I. LIMITED PARTNERSHIP, | | 2519—2537 |
| | For what purposes formed, | 2519 |
| | General and special partners joined; liability of special, | 2520 |
| | Must make certificate; what to contain, | 2521 |
| | Registration of certificate, | 2522 |
| | Affidavit of payment of cash, | 2523 |
| | Registration essential, | 2524 |
| | False statement, all general partners, | 2525 |
| | Publication of terms of, | 2526 |
| | Affidavits of publication filed, | 2527 |
| | Renewals and continuances, | 2528 |
| | Alterations in names, etc., a dissolution, | 2529 |
| | Name of firm, | 2530 |
| | Actions as in general partnership, | 2531 |
| | Special stock not withdrawn, | 2532 |
| | Depleted capital made good, when, | 2533 |
| | Rights of special partner, | 2534 |
| | Accounting inter se, | 2535 |
| | Effect of insolvency, | 2536 |
| | Dissolution, | 2537 |
| II. SURVIVING PARTNERS, | | 2538—2545 |
| | Inventory by, in sixty days; copy to personal representative, | 2538 |
| | On refusal of, personal representative may take inventory; | |
| | receiver appointed, when, | 2539 |
| | Notice to creditors, | 2540 |
| | Debts without lien paid pro rata, | 2541 |
| | Action on claim not presented in twelve months, | 2542 |
| | Appraisal for purchase by surviving partner; when he can not | |
| | purchase; approval of clerk, | 2543 |
| | Accounting in twelve months; time extended; commissions, | 2544 |
| | Accounting compelled, | 2545 |
| RAILROADS, | | 2546—2642 |
| I. CREATION, | | 2546—2555 |
| | How chartered; number of incorporators; name, and route of | |
| | company stated; amount of capital stock; where filed, | 2546 |
| | Stock subscribed before articles filed; affidavit of directors; | |
| | organization fee paid secretary of state, | 2547 |
| | Copy of articles filed and recorded presumptive evidence of | |
| | incorporation, | 2548 |
| | When and how subscription books opened, | 2549 |
| | Number of directors; term of office; vote by shares; qualifica- | |
| | tion of officers; how purchaser of railroad to become incor- | |
| | porated, | 2550 |
| | What officers and agents president and directors may appoint, | 2551 |
| | Stock may be paid for by installments; nonpayment forfeits, | 2552 |
| | Capital stock, when and how increased, | 2553 |
| | Liability of stockholders; how stockholder made liable; when | |
| | execution issues against, | 2554 |
| | Liability of trustee, guardian or executor holding stock, | 2555 |

CAPTIONS.

| | |
|---|-----------|
| RAILROADS— <i>Continued.</i> | Sections. |
| II. MUNICIPAL SUBSCRIPTIONS, | 2556—2560 |
| Counties may aid railroads, | 2556 |
| How made, | 2557 |
| Election for, held, | 2558 |
| How interest on bonds paid, | 2559 |
| How taxes for bonds collected, | 2560 |
| III. CHARTER FORFEITED, | 2561—2563 |
| By preference to shippers, | 2561 |
| By failure to begin in two years or to complete in ten, | 2562 |
| Company dissolved, owner or purchaser a corporation, | 2563 |
| IV. CORPORATE POWERS, | 2564—2572 |
| This chapter applicable to all railroads, | 2564 |
| General powers, | 2565 |
| Highways crossed, | 2566 |
| Not to obstruct roads or ways, | 2567 |
| When company may turn roads, | 2568 |
| Damages paid, when road turned, | 2569 |
| Established roads not impeded until new road made, | 2570 |
| Route changed, | 2571 |
| Merger of; certificate to secretary of state; effect, | 2572 |
| V. EMINENT DOMAIN, | 2573—2596 |
| What companies may exercise, | 2573 |
| May take material from adjacent lands, | 2574 |
| How material paid for, | 2575 |
| Dwelling-house and burial grounds can not be condemned, | 2576 |
| Proceedings when parties can not agree, | 2577 |
| Petition filed; contains what; copy served, | 2578 |
| How process served, | 2579 |
| Service where parties unknown, | 2580 |
| When court may direct how papers to be served, | 2581 |
| Answer to petition; hearing; commissioners appointed, | 2582 |
| Powers and duties of commissioners, | 2583 |
| Report of commissioners, form of, | 2584 |
| Exceptions to report; hearing; appeal; when title vests; restitution, when, | 2585 |
| Jury trial on exceptions to report, when, | 2586 |
| When benefits exceed damage, company pays cost, | 2587 |
| Title of infants, persons non compos, and trustees without power of sale, acquired, | 2588 |
| Rights of claimants of fund determined, | 2589 |
| Attorney for unknown parties appointed; pleadings amended; new commissioners appointed, | 2590 |
| Court may make rules of procedure in, | 2591 |
| Change of ownership pending proceeding, | 2592 |
| Defective title, how cured, | 2593 |
| Title to state lands acquired, | 2594 |
| Widths which may be condemned for certain purposes, | 2595 |
| No railroad, etc., to be established unless authorized by law, | 2596 |
| VI. CONSTRUCTION, | 2597—2601 |
| Map of route served with petition, | 2597 |
| Map of railroad, made and filed, | 2598 |
| Cattle guards; plantation roads, | 2599 |
| When two companies may jointly construct a line, | 2600 |
| When may be constructed partly in another state, | 2601 |
| VII. SERVANTS AND POLICE, | 2602—2608 |
| Conductors and other employees to wear badge, when on duty, | 2602 |
| May apply to governor to appoint police, | 2603 |
| Governor may appoint and issue commission, | 2604 |
| Oath and powers of special policemen, | 2605 |
| Police to wear badge when on duty, | 2606 |

CAPTIONS.

RAILROADS—Continued.

| | Sections. |
|---|-----------|
| Compensation of police, | 2607 |
| Dismissal of police; notice, where filed. | 2608 |
| VIII. OPERATION OF TRAINS, | 2609—2615 |
| Trains to run on schedule; schedule published; must transport freight and passengers, | 2609 |
| How cars arranged in passenger train, | 2610 |
| What trains may run on Sunday, | 2611 |
| Fast mail trains authorized; one train a day in each direction required, | 2612 |
| Vestibule fronts on street railway cars, | 2613 |
| Street railways to have fenders in front of passenger cars, | 2614 |
| May seize and use fuel, | 2615 |
| IX. PASSENGERS, | 2616—2627 |
| First and second class accommodations, | 2616 |
| Separate accommodations for different races, | 2617 |
| Corporation commission may exempt certain roads and trains, | 2618 |
| When two races put in same coach, | 2619 |
| Penalty for failing to provide separate cars, | 2620 |
| Must check baggage; liable for loss, | 2621 |
| Baggage handled carefully, | 2622 |
| Ticket to intoxicated man refused, | 2623 |
| May prevent intoxicated person from entering, | 2624 |
| Unused tickets to be redeemed, | 2625 |
| Injury to passengers on platform, etc., | 2626 |
| Refusing to pay fare, may eject, | 2627 |
| X. FREIGHT, | 2628—2635 |
| Freight rates posted, | 2628 |
| Penalty for failure to receive, | 2629 |
| Failure to transport in the state; penalty, | 2630 |
| Unclaimed freight sold, | 2631 |
| Unclaimed perishable freight, | 2632 |
| Funds from unclaimed freight go to university, | 2633 |
| Through freight and travel, | 2634 |
| Charges on partial freight deliveries, | 2635 |
| XI. OVERCHARGES, | 2636—2638 |
| Not to receive more than tariff rate, | 2636 |
| Overcharge on tariff rates refunded, | 2637 |
| Penalty for failure to refund overcharge. | 2638 |
| XII. MISCELLANEOUS, | 2639—2642 |
| Live stock killed, negligence presumed, | 2639 |
| Injuries by negligence of fellow-servants; defective machinery, | 2640 |
| How action brought for penalties, | 2641 |
| Officials to account to successors, | 2642 |

REGISTER OF DEEDS, 2643—2661

| | |
|--|-----------|
| I. OFFICE OF, | 2643—2648 |
| Seal of office, | 2643 |
| Election for, | 2644 |
| Vacancy filled by commissioners, | 2645 |
| Oath of office, | 2646 |
| Where kept, | 2647 |
| When open, | 2648 |
| II. DUTIES OF, | 2649—2661 |
| Call on clerk for instruments, | 2649 |
| Proceed against clerk for failure to deliver papers, | 2650 |
| Certify and register copies, | 2651 |
| To register instruments within what time, | 2652 |
| Bond liable for failure to register, | 2653 |
| To file papers alphabetically, | 2654 |

CAPTIONS.

| | |
|--|------------|
| REGISTER OF DEEDS— <i>Continued.</i> | Sections. |
| Transcribe and index books on order, | 2655 |
| Number of survey in grants registered, | 2655a |
| Keep general index, | 2656 |
| Index instruments, | 2657 |
| Clerk to board of commissioners, | 2658 |
| Serve certain notices by mail, | 2659 |
| Make out tax lists, | 2660 |
| Omitted duties, how performed, | 2661 |
| RELIGIOUS SOCIETIES, | 2662—2666 |
| May appoint trustees, | 2662 |
| May remove trustees, | 2663 |
| Title to lands to vest in trustees, or in societies, | 2664 |
| How to convey land, | 2665 |
| House on vacant land vests title, | 2666 |
| RESTORATION TO CITIZENSHIP, | 2667—2672 |
| Petition for, | 2667 |
| When and where petition for, filed, | 2668 |
| Notice given, | 2669 |
| Hearing and evidence, | 2670 |
| Decree, | 2671 |
| Pardon, procedure after, | 2672 |
| RIVERS AND CREEKS, | 2673—2684 |
| County commissioners to appoint commissioners, | 2673 |
| Overseers appointed annually; duty, | 2674 |
| Flats and appurtenances procured, | 2675 |
| Neuse river in certain counties, | 2676 |
| Laid off in districts; passage for fish, | 2677 |
| Commissioners to examine streams, | 2678 |
| Report made and confirmed, | 2679 |
| Gates and dams discontinued, | 2680 |
| Repairing breaks, | 2681 |
| Entry upon lands of another to make repairs, | 2682 |
| Draws in bridges, | 2683 |
| Public landings, | 2684 |
| ROADS, BRIDGES AND FERRIES, | 2685—2732 |
| I. DESCRIBED, | 2685—2686 |
| What constitute; board of supervisors, | 2685 |
| Width, | 2686 |
| II. ESTABLISHED, | 2687—2695 |
| By whom; jurors; appeal, | 2687 |
| Petition; notice given, | 2688 |
| How laid out, | 2689 |
| Cartways, tramways, established, | 2690 |
| Church roads established, | 2691 |
| Petition for church road; procedure, | 2692 |
| Manner of laying out, | 2693 |
| Appeal; bond; trial de novo, | 2694 |
| Public ferry sites condemned, | 2695 |
| III. CHANGED OR DISCONTINUED, | 2696—2698 |
| On petition, | 2696 |
| By land owner. | 2697 |
| Cartways, tramways, railways; gates, | 2698 |
| IV. BRIDGES, | 2699—2707b |
| Where footways and hollow bridges maintained, | 2699 |
| How made and maintained; when connecting two counties; | |
| liability of county commissioners, | 2700 |

CAPTIONS.

ROADS, BRIDGES AND FERRIES—*Continued.*

| | Sections. |
|---|---------------|
| Person constructing ditch across public road to maintain, | 2701 |
| When county to erect draws, | 2702 |
| When owner of, to put in draw, | 2703 |
| Railroad keep up, when, | 2704 |
| Railroad keep up draws, when, | 2705 |
| County orders for, valid, | 2706 |
| Penalty for neglect to repair, | 2707 |
| How expense of maintaining, borne, | 2707a |
| Solicitor to prosecute for injury to bridges, | 2707b |
| V. TOLL BRIDGES, | 2708—2712 |
| When commissioners may establish, | 2708 |
| Commissioners may regulate tolls, | 2709 |
| Owner of ferry may build, | 2710 |
| Owner of, and ferries to give bond, | 2711 |
| Penalty on unauthorized ferry, | 2712 |
| VI. GATES ACROSS, | 2713 |
| Permission for erection, | 2713 |
| VII. SUPERVISORS, | 2714—2716 |
| To meet, when and where, | 2714 |
| To make annual reports to superior court, | 2715 |
| To have orders appointing overseers served within thirty days; penalties, | 2716 |
| VIII. OVERSEERS, | 2717—2726 |
| When appointed; when hands allotted, | 2717 |
| Reports to supervisors, | 2718 |
| To report money collected and how expended, | 2719 |
| May lay off tasks to hands, | 2720 |
| May use timber and dirt on roads, | 2721 |
| Notice to work on road, how served, | 2722 |
| When roads to be worked, | 2723 |
| Sign posts put up, | 2724 |
| Mile posts put up correctly, | 2725 |
| Penalty for neglecting duty, | 2726 |
| IX. WHO TO WORK, | 2727—2728 |
| Who liable, | 2727 |
| Who exempt; how exemption obtained, | 2728 |
| X. GENERAL PROVISIONS, | 2731—2732 |
| Traction engines allowed on roads, | 2731 |
| Owners of land or timber used on road, remedy for, | 2732 |
| SALARIES AND FEES, | 2734—2812 |
| I. LEGISLATIVE DEPARTMENT, | 2734—2740 |
| Members of general assembly and presiding officers, | 2734 |
| Clerks and doorkeepers, | 2735 |
| Copyists, | 2736 |
| Principal clerks, extra compensation, | 2737 |
| Indexing laws, etc., | 2738 |
| Temporary doorkeepers, | 2739 |
| Employees, how paid, | 2740 |
| II. EXECUTIVE DEPARTMENT, | 2741—2767 |
| Governor, | 2741 |
| Private secretary, | 2742 |
| Executive clerk, | 2743 |
| Employees at executive mansion, | 2744 |
| Treasurer, | 2745 |
| Committee to examine treasurer's and auditor's books, | 2745a |
| Secretary of state, | 2746 |
| Secretary of state, fees collected, | 2747 |
| Fees on returns to secretary of state, | 2748 |

CAPTIONS.

SALARIES AND FEES—Continued.

| | Sections. |
|--|-----------|
| Auditor, | 2749 |
| Superintendent of public instruction, | 2750 |
| Attorney general, | 2751 |
| Fees of attorney general, | 2752 |
| State librarian, | 2753 |
| Commissioner of agriculture, | 2753a |
| Adjutant general, | 2754 |
| Paymaster general, | 2755 |
| Quartermaster general, | 2756 |
| Militia officers, | 2757 |
| Commissioner of labor and printing, | 2758 |
| Corporation commissioners, | 2759 |
| Bank examiners, | 2760 |
| Insurance commissioner, | 2761 |
| Board of internal improvements, | 2762 |
| State standard-keeper, | 2763 |
| State board of elections, | 2764 |
| Presidential electors, | 2765 |
| Laborers, | 2766 |
| Laborer's leave of absence, commutation, | 2767 |
| III. JUDICIAL DEPARTMENT, | 2768—2775 |
| Supreme court justices, | 2768 |
| Superior court judges, | 2769 |
| Certificates of courts held by judges, | 2770 |
| Solicitors, | 2771 |
| Fees of solicitors, | 2772 |
| Supreme court clerk, | 2773 |
| Supreme court marshal, | 2774 |
| Supreme court reporter, | 2775 |
| IV. GENERAL PROVISIONS, | 2776—2778 |
| Salaries payable monthly, | 2776 |
| Expense allowances, | 2777 |
| Clerical assistance, | 2778 |
| V. COUNTY OFFICERS, | 2779—2792 |
| Superior court clerk, | 2779 |
| Clerks must keep fee bill posted, | 2780 |
| Coroners, | 2781 |
| Register of deeds, | 2782 |
| Sheriffs, | 2783 |
| County treasurer, | 2784 |
| Examining committee of treasurer's books, | 2785 |
| Standard-keeper, | 2786 |
| Finance committee, | 2787 |
| County superintendent of public instruction, | 2788 |
| County board of pensions, | 2789 |
| Election officers, | 2790 |
| County commissioners, | 2791 |
| County board of education, | 2792 |
| VI. TOWNSHIP OFFICERS, | 2793—2795 |
| Constable, | 2793 |
| Justices of the peace, | 2794 |
| Justices must itemize bills of cost, | 2795 |
| VII. COMMISSIONERS, | 2796—2802 |
| Assessing damages for right of way, | 2796 |
| In partition, | 2797 |
| In sale, for partition, | 2798 |
| In partition, land in another state, | 2799 |
| Assessing damages for mills, | 2800 |
| Of affidavits, | 2801 |
| Receiver selling as, | 2802 |

CAPTIONS.

SALARIES AND FEES—Continued.

| | Sections. |
|--|-----------|
| VIII. MISCELLANEOUS, | 2803—2812 |
| Jurors, | 2803 |
| Jailers, | 2804 |
| Notaries, | 2805 |
| Entry-taker, | 2806 |
| Surveyors and chain-carriers, | 2807 |
| Witnesses, | 2808 |
| Fees, by whom paid; when in advance, | 2809 |
| Copy-sheet, what constitutes. | 2810 |
| Keeper of capitol, | 2811 |
| Board of public charities, | 2812 |
| SHERIFF, | 2813—2836 |
| I. OFFICE OF, | 2813—2816 |
| Election for, | 2813 |
| Ineligibility for, | 2814 |
| Resignation of, | 2815 |
| Vacancy in, how filled; guilty of a misdemeanor, | 2816 |
| II. BOND, | 2817—2822 |
| County commissioners to take, | 2817 |
| Renewed annually; on failure, office vacant, | 2818 |
| Justification of, required when bond insufficient, | 2819 |
| Commissioners liable for loss, when, | 2820 |
| Liability of sureties on, | 2822 |
| III. DUTIES OF, | 2823—2833 |
| To receipt for process, | 2823 |
| Execute process; false return, penalty for, | 2824 |
| Summons, orders, and judgments, how executed, | 2825 |
| Outgoing sheriffs not executing process, penalty. | 2826 |
| Pay money to plaintiff, or into clerk's office, | 2827 |
| Solicitor to prosecute officer for escape, | 2828 |
| Not to allow escape, | 2829 |
| Have custody of jail, | 2830 |
| Prevent jail breaking for lynching, | 2830a |
| To publish list of delinquent tax payers. | 2831 |
| Furnish list of liquor dealers to grand jury, | 2832 |
| Not to farm office, | 2833 |
| STATUTES, CONSTRUCTION OF, | 2837—2839 |
| Repeal of statute not to affect actions. | 2837 |
| Rules for construction of statutes, | 2838 |
| Where amended, how construed, | 2839 |
| STRAYS, | 2840—2842 |
| Owner notified; if unknown, register of deeds notified. | 2840 |
| Owner may reclaim, | 2841 |
| When and how strays sold. | 2842 |
| SUNDAY AND HOLIDAYS, | 2843—2846 |
| Work in ordinary calling on Sunday forbidden, | 2843 |
| What process executed on Sunday, | 2844 |
| Dates of public holidays, | 2845 |
| Acts to be done on Sunday or holiday, | 2846 |
| SURETY, | 2847—2855 |
| Suretyship shown, what judgment and execution to contain, | 2847 |
| Property of principal sold before that of surety, | 2848 |
| Summary remedy for and against principal, | 2849 |
| Surety paying debt of deceased principal, subrogated to creditors, rights, | 2850 |
| Cosurety liable for contribution, | 2851 |
| May dissent from stay of execution; not then liable to surety on stay, | 2852 |

CAPTIONS.

| | | |
|--|---|----------------------|
| SURETY—Continued. | | Sections. |
| | May notify creditor to collect; penalty for delay, | 2853 |
| | Negligence of creditor discharges surety, when; proviso, | 2854 |
| | How notice served, | 2855 |
| TAXES, COLLECTION OF, | | 2856—2915 |
| I. GENERAL PROVISIONS, | | 2856—2865 |
| | Chapter to remain in force unless expressly repealed or amended by, or clearly in conflict with, later acts, | 2856 |
| | Application and construction of this chapter, | 2857 |
| | Definitions, | 2858 |
| | When taxes are due, | 2859 |
| | Payable in national currency, | 2860 |
| | No taxes to be released; penalty, | 2861 |
| | Injunction and replevin not allowed; remedy of taxpayer, | 2862 |
| | How tax list endorsed; equivalent to judgment and execution, | 2863 |
| | Taxes to be paid in cases of judicial sales and sales under powers, | 2864 |
| | Lienor may pay taxes and retain lien of, | 2865 |
| II. LIFE TENANTS AND COTENANTS, | | 2866—2867 |
| | Life tenant failing to pay taxes forfeits estate and liable for damages, | 2866 |
| | Cotenant or joint owner may pay total tax or his share; may redeem; remedies for expenditures in excess of his share, | 2867 |
| III. INFANTS AND LUNATICS, | | 2868—2869 |
| | Minors and persons non compos, lands of, not to be sold, personality may be, | 2868 |
| | Guardians and other fiduciaries must pay taxes, | 2869 |
| IV. LIEN OF TAXES, | | 2870—2873 |
| | Personal property, | 2870 |
| | Real estate, | 2871 |
| | Railroad property, | 2872 |
| | Tax lien foreclosed by action; parties to, | 2873 |
| V. SHERIFF'S POWERS AND DUTIES, | | 2874—2884 |
| | Sheriff's duties, | 2874 |
| | Sureties of sheriff may collect, when; their liabilities, | 2875 |
| | Time limited for collection of taxes, | 2876 |
| | Attendance in township to collect taxes; notice, | 2877 |
| | Process to another county to enforce payment of taxes, | 2878 |
| | License taxes, levy and sale to collect, | 2879 |
| | To prosecute delinquents for license taxes, | 2880 |
| | Property in hands of receiver, | 2881 |
| | Garnishee and attachment proceedings, | 2882 |
| | Corporation failing to pay taxes; garnishment, penalty, | 2883 |
| | Fees of sheriff and expenses of sale, etc., | 2884 |
| VI. SALE OF PERSONALTY, | | 2885—2887 |
| | To be first exhausted, | 2885 |
| | As under execution, | 2886 |
| | What subject to, | 2887 |
| VII. SALE OF REALTY, | | 2888—2899 |
| | When liable to, | 2888 |
| | Time and place for, | 2889 |
| | Notice to be given delinquent, | 2890 |
| | Advertisement, | 2891 |
| | How made, | 2892 |
| | Sales book to be kept; copy filed with register of deeds; copy evidence of regularity, etc., | 2893 |
| | Records sufficient proof of sale, | 2894 |
| | Listed in name of wrong person, | 2895 |
| | Irregularities immaterial, | 2896 |

CAPTIONS.

| | |
|---|-----------|
| TAXES, COLLECTION OF— <i>Continued.</i> | Sections. |
| Irregularities defined, | 2897 |
| De facto officers, acts of, valid, | 2898 |
| Cancellation of void sales and deeds, | 2899 |
| VIII. CERTIFICATE OF SALE, | 2900—2903 |
| Sheriff issues to purchaser; form, | 2900 |
| Separate certificates required, when, | 2901 |
| Certificate when county, city, etc., is purchaser; right of corporation to transfer, | 2902 |
| Certificate presumptive evidence of validity, | 2903 |
| IX. DEEDS UNDER TAX SALE, | 2904—2910 |
| Notice of purchase, what to contain; how published; when and on whom served, | 2904 |
| Purchaser to make affidavit before receiving; what affidavit to contain, | 2905 |
| Deed, when and by whom to be made, | 2906 |
| Form, | 2907 |
| Separate deeds required, when, | 2908 |
| Registration, | 2909 |
| Evidence of what, | 2910 |
| X. PURCHASERS AT TAX SALE, | 2911—2913 |
| Purchaser reimbursed by county when sale by mistake, etc.; liability of sheriff; state to refund, when, | 2911 |
| Lien of purchaser, | 2912 |
| Remedies of purchasers at tax sales; foreclosure by action; duty of county to foreclose, | 2913 |
| XI. REDEMPTION, | 2914—2915 |
| When, by whom and how effected; amount to be paid, | 2914 |
| To whose benefit it inures, | 2915 |
| TOWNS, | 2916—2981 |
| I. INCORPORATION AND POWERS, | 2916—2919 |
| Every town a body politic, | 2916 |
| Corporate powers, | 2917 |
| How corporate powers exercised, | 2918 |
| How far this chapter applicable; meaning of "commissioners," | 2919 |
| II. COMMISSIONERS, | 2920—2923 |
| Elected biennially by qualified voters, | 2920 |
| Oath of office of, | 2921 |
| Vacancy, how filled, | 2922 |
| How number of, changed, | 2923 |
| III. POWERS OF COMMISSIONERS, | 2924—2932 |
| Ordinances, rules and regulations made by, | 2924 |
| May levy taxes, | 2925 |
| May appoint a constable and other officers; fix salary of mayor and others, | 2926 |
| May appoint police, | 2927 |
| Policemen may execute criminal process, | 2928 |
| May establish and regulate markets; street sales free, when, | 2930 |
| May abate nuisances, | 2931 |
| Shall repair streets and bridges, | 2932 |
| IV. MAYOR, | 2933—2939 |
| How elected; tie vote; tenure of office; vacancy, | 2933 |
| To take oath of office, | 2934 |
| Presiding officer at commissioners' meetings; mayor pro tem., | 2935 |
| Criminal jurisdiction of, | 2936 |
| Ordinances and penalties enforced; appeals, | 2937 |
| Mayor must certify ordinances on appeal, | 2938 |
| May sentence to work on streets to pay fine, | 2939 |

CAPTIONS.

TOWNS—Continued.

| | Sections. |
|---|-----------|
| V. CONSTABLE, | 2940—2942 |
| To take an oath of office, | 2940 |
| Power as to process and as peace officer, | 2941 |
| Power as tax collector; bond, | 2942 |
| VI. OFFICERS, | 2943—2945 |
| Must be voters in town or city, | 2943 |
| Penalty for refusing to qualify and act, | 2944 |
| Hold over, when, | 2945 |
| VII. ELECTIONS, | 2946—2969 |
| How far this chapter applicable, | 2946 |
| When election held, | 2947 |
| Polling places, | 2948 |
| Registrars appointed; public notified; vacancy, | 2949 |
| Registrars to take an oath, | 2950 |
| Registration of voters, | 2951 |
| Notice of new registration, | 2952 |
| Registration books revised, | 2953 |
| When registration books opened and closed; who may register, | 2954 |
| Registration on election day, | 2955 |
| Vacancies on election day, | 2956 |
| When books open for challenge, | 2957 |
| Practice in challenges, | 2958 |
| Registration books, where deposited, | 2959 |
| Judges of election appointed; oath of, | 2960 |
| Judges superintend election; poll books, | 2961 |
| When polls open and close, | 2962 |
| Who may vote, | 2963 |
| Ballots and ballot boxes, | 2964 |
| Ballots counted; result declared; void ballots, | 2965 |
| Board of canvassers; original returns, | 2966 |
| When and where board meets; oath, | 2967 |
| Board determines result; tie vote, | 2968 |
| Notice of special election, | 2969 |
| VIII. TAXES, * | 2970—2975 |
| Must be uniform and ad valorem, | 2970 |
| Tax list taken, by whom; failure to list, pays double tax, | 2971 |
| Tax list corrected, | 2972 |
| Dog tax, | 2973 |
| Monthly settlements by tax collector, | 2974 |
| Annual statement taxes received and disbursed, published, | 2975 |
| IX. MUNICIPAL DEBTS, | 2976—2978 |
| No debt or tax except for necessities, but by vote of people, | 2976 |
| How paid, | 2977 |
| Limited to ten per cent. of assessed values, | 2978 |
| X. MUNICIPAL PROPERTY SOLD, | 2979—2981 |
| By mayor and commissioners at public sale, | 2979 |
| By county commissioners if town is unincorporated, | 2980 |
| Title made by mayor, | 2981 |

TRADEMARKS.

| | |
|---|-----------|
| I. GENERALLY, | 2982—2992 |
| Trademarks, labels, etc., filed for registry, | 2982 |
| Property rights protected by filing for registry, | 2983 |
| Filed with secretary of state; affidavit; fees, | 2984 |
| Registration; certified copies evidence; fees, | 2985 |
| How transferred, | 2986 |
| Similar trademarks refused registration, | 2987 |
| Penalty for securing fraudulent registration, | 2988 |
| Use of counterfeit trademarks unlawful, | 2989 |
| Unauthorized use unlawful; use under license, | 2990 |

CAPTIONS.

| | |
|--|-----------|
| TRADEMARKS— <i>Continued.</i> | Sections. |
| Remedies; damages; profits; destruction of counterfeits, | 2991 |
| Additional penalty, | 2992 |
| II. TIMBER, | 2993—2997 |
| Who may adopt, | 2993 |
| How adopted, registered and published, | 2994 |
| Property in; how used. | 2995 |
| Branding with, effect of, | 2996 |
| Branding with; evidence of ownership, | 2997 |
| III. LIVE STOCK, | 2998 |
| Owners of stock to register brand or mark, | 2998 |
| WAREHOUSEMEN, | 2999—3014 |
| I. PUBLIC, | 2999—3011 |
| Who may become, | 2999 |
| Bond to clerk of court; penal sum, | 3000 |
| Injured person may sue on bond. | 3001 |
| Insurance on stored property; storage receipts. | 3002 |
| Title passes with storage receipt, | 3003 |
| Title when goods are mixed, | 3004 |
| Books of account kept; open for inspection, | 3005 |
| Sale of property for storage charges one year overdue; pro- | |
| ceeds; notice of sale, | 3006 |
| Notice, how served; return of; publication, | 3007 |
| Surplus disposed of, | 3008 |
| When perishable or dangerous property is stored; proceeds of | |
| sale paid to clerk, when, | 3009 |
| When unable to sell perishable or worthless property, | 3010 |
| Storer liable for charges, when, | 3011 |
| II. TOBACCO WAREHOUSE CHARGES, | 3012—3014 |
| Maximum charges fixed. | 3012 |
| Weighers sworn, | 3013 |
| Bill of charges rendered; penalty, | 3014 |
| WATER SUPPLIES, | 3015—3031 |
| I. PROTECTION OF WATERSHEDS, | 3015—3023 |
| Inspection of, | 3015 |
| Rivers and large creeks inspected fifteen miles, | 3016 |
| Penalty for failing to inspect, | 3017 |
| Cities and towns to make inspection, | 3018 |
| Residents on watersheds to obey instructions, | 3019 |
| Inspectors may enter upon premises, | 3020 |
| Sewage not discharged in, | 3021 |
| Towns, etc., not having sewerage system, | 3022 |
| No cemetery on watershed, | 3023 |
| II. ANALYSES, | 3024—3026 |
| To be made, | 3024 |
| State board of health may have examination made; fee, | 3025 |
| State board of health to make examinations, | 3026 |
| III. MISCELLANEOUS PROVISIONS, | 3027—3029 |
| Precaution against contamination, | 3027 |
| Mayors to have concurrent jurisdiction, | 3028 |
| Condemnation of lands, | 3029 |
| IV. FOR PUBLIC INSTITUTIONS, | 3030—3031 |
| May enter upon lands to lay pipes, etc., | 3030 |
| Compensation for land, | 3031 |
| WEIGHTS AND MEASURES, | 3032—3048 |
| I. STANDARDS OF, | 3032—3036 |
| To be used by traders; exception. | 3032 |

CAPTIONS.

| WEIGHTS AND MEASURES— <i>Continued.</i> | Sections. |
|---|-----------|
| Provided by commissioners; branded, | 3033 |
| What is an acre of land, | 3034 |
| How many pounds to a bushel; penalty, | 3035 |
| Penalty for using untested. | 3036 |
| II. STATE KEEPER, | 3037—3040 |
| Appointed by governor; keeper of capitol, when, | 3037 |
| Duties of, | 3038 |
| Must supply counties at their cost, | 3039 |
| Record kept by, | 3040 |
| III. COUNTY KEEPER, | 3041—3043 |
| Appointed by commissioners; tenure; oaths, | 3041 |
| May test every two years; penalty; exception, | 3042 |
| Destroys weights and measures, when, | 3043 |
| IV. SURVEYORS, | 3044—3048 |
| What is a surveyor's chain; tested, | 3044 |
| Magnetic instruments and chains tested, | 3045 |
| Instruments tested in another county, | 3046 |
| Tests returned to register of deeds; registered, | 3047 |
| Meridian monuments protected by county commissioners. | 3048 |
| WIDOWS, | 3049—3079 |
| I. DISSENT FROM WILL, | 3049—3051 |
| How; when, | 3049 |
| Effect of dissent, | 3050 |
| Not liable for husband's debts, | 3051 |
| II. DOWER, | 3052—3055 |
| Who entitled to, | 3052 |
| Consists of what, | 3053 |
| Husband's alienation does not bar, except to secure purchase money, | 3054 |
| Conveyed by joining in deed, | 3055 |
| III. DOWER ALLOTTED, | 3056—3059 |
| Assigned by agreement, when, | 3056 |
| Application for, | 3057 |
| How assigned, | 3058 |
| Notice to parties of meeting of jury, | 3059 |
| IV. YEAR'S SUPPORT, | 3060—3064 |
| Who entitled, | 3060 |
| Value, | 3061 |
| Family defined, | 3062 |
| If no widow, children entitled, | 3063 |
| From what assigned, | 3064 |
| V. YEAR'S SUPPORT ASSIGNED, | 3065—3071 |
| Personal representative shall assign, | 3065 |
| Value ascertained, | 3066 |
| Procedure to assign, | 3067 |
| Duty of commissioners, | 3068 |
| Appeal, | 3069 |
| Duty of appellant, | 3070 |
| Allowance to widow a credit to personal representative. | 3071 |
| VI. INCREASED ALLOWANCE, | 3072—3079 |
| When allowance in full, | 3072 |
| Assigned on application to superior court, | 3073 |
| Proceeding; parties. | 3074 |
| Complaint, | 3075 |
| Judgment, | 3076 |
| Duty of commissioners; report, | 3077 |
| Exceptions by interested persons, | 3078 |
| Confirmation; execution; costs, | 3079 |

CAPTIONS.

| | |
|--|-----------|
| | Sections. |
| WILLS, | 3080—3115 |
| I. EXECUTION, | 3080—3083 |
| Age of testators, | 3080 |
| Married women; proviso, | 3081 |
| How executed, | 3082 |
| Execution of appointments by, | 3083 |
| II. REVOCATION, | 3084—3087 |
| How written will revoked, | 3084 |
| Revoked by marriage; exception, | 3085 |
| Not revoked by altered circumstances, | 3086 |
| Conveyance after execution does not, | 3087 |
| III. WITNESSES, | 3088—3090 |
| Executors competent, | 3088 |
| Devise, | 3089 |
| Witness dead, affidavits evidence, when, | 3090 |
| IV. PROBATE, | 3091—3103 |
| Executor may apply for, | 3091 |
| Executor failing, who may apply, | 3092 |
| Production of will for, compelled, | 3093 |
| What shown on application, | 3094 |
| Proof and examination in writing, | 3095 |
| How admitted to probate, | 3096 |
| How far probate conclusive, | 3097 |
| Wills filed in clerk's office, | 3098 |
| Certified copy of will proved in another state, | 3099 |
| Made out of state, how proven, | 3100 |
| Where witnesses reside in different county, how proven, | 3101 |
| Nonresident's will, reentered; proof, | 3102 |
| Probates validated, | 3103 |
| V. CAVEAT, | 3104—3106 |
| When and how filed, | 3104 |
| Cause transferred to trial docket, when, | 3105 |
| Filing of, suspends proceedings under will, | 3106 |
| VI. CONSTRUCTION, | 3107—3115 |
| Devise presumed a fee simple, | 3107 |
| Valid only after probate; conclusiveness of probate, | 3108 |
| What property passes by will, | 3109 |
| Speak as of death of testator, | 3110 |
| Lapsed and void devises pass under residuary clause, | 3111 |
| General gift includes estate to which testator has power to appoint, | 3112 |
| Gifts to children dying, pass to issue, | 3113 |
| Void as to after-born child, | 3114 |
| Administrator e. t. a. must observe will, | 3115 |
| WRECKS, | 3116—3129 |
| Number and boundaries of wreck districts, | 3116 |
| Commissioners of wrecks, how appointed, | 3117 |
| Wreck commissioner to take oath of office, | 3118 |
| Duty of commissioner, | 3119 |
| Salvage paid; property remains in custody until paid, | 3120 |
| How salvage fixed on disagreement, | 3121 |
| When and how wrecked property sold for salvage, | 3122 |
| When goods removed without sale; fees of commissioner, | 3123 |
| Unclaimed property, how sold, | 3124 |
| Proceeds of unclaimed property paid to clerk superior court, | 3125 |
| Clerk to advertise for owner; if not claimed, how funds paid, | 3126 |
| How ownership of fund proven, | 3127 |
| Stranded property when found, reported, | 3128 |
| Expenses deducted from proceeds of sales, | 3129 |

CAPTIONS.

| | Sections. |
|---|-----------|
| CRIMINAL PROCEDURE, | 3130—3266 |
| I. GENERAL PROVISIONS, | 3130—3138 |
| Limitations, indictments for misdemeanor, | 3130 |
| When criminal process issued and returned, | 3130 |
| Process, how endorsed, | 3132 |
| Accused entitled to counsel, | 3133 |
| Where persons may be imprisoned, | 3134 |
| Who may direct post-mortem examination, | 3135 |
| Stolen property returned to owner, | 3136 |
| Magistrate may associate another with him, | 3137 |
| Commitments for felonies, when tried or discharged, | 3138 |
| II. WARRANTS, | 3139—3145 |
| Who may issue, | 3139 |
| Complainant examined on oath, | 3140 |
| When to issue; contains what; to whom directed, | 3141 |
| Where to run, | 3142 |
| How endorsed; what officer compelled to serve, | 3143 |
| Magistrate endorsing, not liable to action, | 3144 |
| Before what magistrate returnable, | 3145 |
| III. SEARCH WARRANTS, | 3146—3147 |
| How issued, when to run, | 3146 |
| Form of, and procedure thereon, | 3147 |
| IV. PEACE WARRANTS, | 3148—3158 |
| Who may issue, | 3148 |
| Complaint to obtain, | 3149 |
| When to issue, | 3150 |
| Breach of peace in presence of court, | 3151 |
| To whom directed, | 3152 |
| Proceeding on, | 3153 |
| When accused discharged, | 3154 |
| When defendant imprisoned, | 3155 |
| Defendant may appeal, | 3156 |
| How discharged after imprisonment, | 3157 |
| When and where recognizance returned, | 3158 |
| V. ARREST, | 3159—3165 |
| Who may, for breach of peace, without warrant, | 3159 |
| Who may, for felony, without warrant, | 3160 |
| Officer may, without warrant, when, | 3161 |
| Who may break house to prevent felony, | 3162 |
| Officer may break and enter houses, | 3163 |
| Who compelled to assist, | 3164 |
| Procedure on, | 3165 |
| VI. FUGITIVES, | 3166—3172 |
| Felons fleeing from justice, outlawed, | 3166 |
| From another state, how arrested and held, | 3167 |
| Magistrate to keep record; transmit copy to governor, | 3168 |
| Duty of governor, | 3169 |
| Surrendered on order of governor, | 3170 |
| Governor may employ agents, and offer rewards for arrest of, | 3171 |
| Expenses of bringing from another state, paid, | 3172 |
| VII. PRELIMINARY HEARING, | 3173—3188 |
| Waiver of examination; bail, | 3173 |
| Procedure, when justice has not final jurisdiction, | 3174 |
| Duty of examining magistrate, | 3175 |
| Testimony reduced to writing; right to counsel, | 3176 |
| Prisoner examined; advised of rights, | 3177 |
| Witnesses not to be present at examination of prisoner, | 3178 |
| Answers reduced to writing, read to prisoner, signed by magistrate, | 3179 |

CAPTIONS.

| CRIMINAL PROCEDURE—Continued. | Sections. |
|--|---------------|
| Witnesses for defendant examined, | 3180 |
| Examination not necessary in misdemeanors, | 3181 |
| When prisoner discharged, | 3182 |
| In lynching, | 3183 |
| Participants in lynching must testify, | 3183a |
| Prisoner bound over, when, | 3184 |
| Witnesses against prisoner recognized, | 3185 |
| Witness required to give security for appearance, | 3186 |
| Examinations and recognizances certified to court, | 3187 |
| Penalty for failing to return, | 3188 |
| VIII. BAIL, | 3189—3195 |
| When bail allowed, | 3189 |
| Sheriff or deputy may take; not to become, | 3190 |
| Who may take bail before imprisonment, | 3191 |
| Who may take bail after imprisonment. | 3192 |
| Recognizance to be filed with clerk, | 3193 |
| Duty of magistrate granting bail. | 3194 |
| Bail on continuance before justice, | 3195 |
| IX. FORFEITED BAIL, | 3196—3211 |
| Proceedings on recognizances to keep the peace, | 3196 |
| Recognizance, when deemed broken, | 3197 |
| When recognizance prosecuted, | 3198 |
| Execution on judgment nisi not to issue before notice, | 3199 |
| What notice to contain, | 3200 |
| How notices executed, | 3201 |
| Judges may remit forfeited recognizances, | 3202 |
| Clerk to refund, when, | 3203 |
| Treasurer to refund, when, | 3204 |
| Upon failure to appear before justice, judgment nisi; notice to sureties, | 3205 |
| Judgment final, when rendered, | 3206 |
| When bond exceeds two hundred dollars, procedure, | 3207 |
| Bail may arrest and surrender principal; effect on liability, | 3208 |
| Person surrendered may give bail; sheriff liable for release, | 3209 |
| Sheriff may take bail of prisoner in custody, | 3210 |
| May plead any defense principal might, | 3211 |
| X. COMMITMENT. | 3212—3214 |
| Must state what, | 3212 |
| To what jail. | 3213 |
| Of witnesses, | 3214 |
| XI. VENUE, | 3215—3221 |
| Lynching, | 3215 |
| When crime committed on waters dividing counties, | 3216 |
| When assault in one county, death in another, | 3217 |
| Assault in this state, death in another, | 3218 |
| Person in this state injuring one in another, | 3219 |
| Death in this state, immaterial where injury inflicted, | 3220 |
| Improper taken advantage of by plea in abatement; judgment in misdemeanors; trial in felonies, | 3221 |
| XII. PRESENTMENT. | 3222—3223 |
| No person arrested on presentment, nor tried except on indictment, | 3222 |
| Names of witnesses endorsed on presentment, | 3223 |
| XIII. INDICTMENT, | 3224—3236 |
| Returned by foreman except in capital cases, | 3224 |
| Substance of proceedings only set forth in, | 3225 |
| For homicide, | 3226 |
| For perjury, | 3227 |
| For perjury, form of, | 3228 |

CAPTIONS.

| CRIMINAL PROCEDURE— <i>Continued.</i> | Sections. |
|--|------------|
| For subornation of perjury, | 3229 |
| When greater punishment for second offense, how former conviction stated, | 3230 |
| Ownership of property in common; how stated in, | 3231 |
| How money, bank notes, etc., described in, | 3232 |
| For embezzlement, | 3233 |
| Intent to defraud; larceny and receiving, | 3234 |
| Not quashed for informality, | 3235 |
| Defects which do not vitiate, | 3236 |
| XIV. TRIAL, BEFORE JUSTICE, | 3237—3242 |
| To hear and determine case, when, | 3237 |
| Trial by jury; if demanded, | 3238 |
| What submitted to jury, | 3239 |
| Commitment after judgment, | 3240 |
| Parties entitled to copy of papers; bar to indictment, | 3241 |
| Justice to make report of all criminal actions of which he has assumed final jurisdiction, | 3242 |
| XV. TRIAL, SUPERIOR COURT, | 3243—3253 |
| Prisoner mute, plea "not guilty" entered, | 3243 |
| Peremptory challenges by defendant; judge decides competency, | 3244 |
| Peremptory challenges by state, | 3245 |
| Jurors on special venire subject to challenge as tales jurors, | 3246 |
| Term expiring during trial, court continued; civil actions, | 3247 |
| Libel, defense to, | 3248 |
| Defendant convicted of assault; when included in charge, | 3249 |
| Conviction may be for a less degree or an attempt, | 3250 |
| Burglary in first degree charged, verdict may be for second, | 3251 |
| Verdict for murder in second degree on bill for first, | 3252 |
| New trial to defendant, | 3253 |
| XVI. APPEAL, | 3254—3263a |
| Defendant may appeal; trial de novo, | 3254 |
| Papers sent to appellate court; return what to contain, | 3255 |
| What state may appeal, | 3256 |
| When defendant may appeal, | 3257 |
| Defendant may appeal without security for costs, | 3258 |
| Appeal granted, bail allowed defendant, | 3259 |
| Bail pending appeal, | 3260 |
| Appeal not to vacate judgment; stays execution, | 3261 |
| Judgment for fines docketed; lien as other judgments; execution issued, | 3262 |
| Upon receipt of certificate of opinion of supreme court, what to be done, | 3263 |
| Rehearing; new trials for new evidence, | 3263a |
| XVII. EXECUTION, | 3264—3266 |
| Governor to issue warrant for execution of death penalty, | 3264 |
| Capital executions private, | 3265 |
| Witnesses and necessary assistants to be present at execution, | 3266 |
| CRIMES, | 3267—3797 |
| I. GENERAL PROVISIONS, | 3267—3272 |
| Accessories to felonies before the fact, when, where, and how tried and punished, | 3267 |
| Accessories to felonies after the fact, when, where, and how tried and punished, | 3268 |
| Accessories before the fact, how punished, | 3269 |
| Felonies and misdemeanors defined, | 3270 |
| Felonies, punishment of, | 3271 |
| Misdemeanors, punishment of, | 3272 |

CAPTIONS.

CRIMES—Continued.

| | Sections. |
|---|-----------|
| II. ANIMALS, | 3273—3304 |
| Contagious diseases, rules for prevention of, | 3273 |
| Contagious diseases, having, sold, | 3274 |
| Contagious diseases, glanders or farcy; having glanders or farcy, to be killed, | 3275 |
| Contagious diseases, hogs not to run at large, | 3276 |
| Contagious diseases, hogs dying with, buried or burned, | 3277 |
| Contagion, prevention of, | 3278 |
| Cruelty to; construed how, | 3279 |
| Cruelty to, instigating or promoting, | 3280 |
| Cruelty to by bear-baiting and cock-fighting, | 3281 |
| Conveying in cruel manner, | 3282 |
| Dogs, female, running at large, | 3283 |
| Dog, sheep-killing, to be killed, | 3284 |
| Dogs, failing to kill when mad, | 3285 |
| False representation of pedigree, | 3286 |
| Fraudulent registration, | 3287 |
| Impounding unlawfully, | 3288 |
| Impounded, releasing or receiving, | 3289 |
| Impounded, to be fed and watered, | 3290 |
| Impounder misappropriating money, | 3291 |
| Injuries to, in inclosure without lawful fence, | 3292 |
| Injury of, in range, | 3293 |
| Killing cattle and failing to show hide and ears, | 3294 |
| Mismarking, | 3295 |
| Stock law territory, not to run at large in, | 3296 |
| Stock law territory, fowls in, | 3297 |
| Stock law territory, wilful driving on lands, | 3298 |
| Stock law territory, riding or driving in, | 3299 |
| Stock law territory, owner in, turning outside, | 3300 |
| Stone-horse running at large, | 3301 |
| Poisoning with shrubs, | 3302 |
| Failure to comply with law as to strays, | 3303 |
| Killing unmarked cattle in Haywood and Hyde counties, | 3304 |
| III. BANKS, | 3305—3307 |
| Examiner making false report, | 3305 |
| Officers and agents, malfeasance of, | 3306 |
| Statements, making false, | 3307 |
| IV. BUILDING AND LOAN ASSOCIATIONS, | 3308—3309 |
| Agent acting without license, | 3308 |
| Failure to exhibit books; false statement, | 3309 |
| V. BURGLARY, | 3310—3314 |
| Burglary, how punished, | 3310 |
| Burglary in first and second degrees, | 3311 |
| Burglary, breaking out of dwelling-house, | 3312 |
| Breaking into houses otherwise than burglariously, | 3313 |
| Burglary, intent to commit, | 3314 |
| VI. BURNINGS, | 3315—3325 |
| Arson, | 3315 |
| Attempts, | 3316 |
| Bridges and buildings, | 3317 |
| Churches and other buildings, | 3318 |
| Crops in field, | 3319 |
| Dwelling-houses, for fraudulent purposes, | 3320 |
| Gin-house, tobacco house or stable, | 3321 |
| Incendiary fires, duty of city officers, | 3321a |
| Incendiary fires, duty of owner of premises, | 3321b |
| Public buildings, | 3322 |
| School-house, | 3323 |
| Woods, | 3324 |
| Woods, from camp fires, | 3325 |

CAPTIONS.

CRIMES—Continued.

| | Sections. |
|---|------------------|
| VII. CHASTITY, | 3326—3332 |
| Carnal knowledge of virtuous girls between ten and fourteen years of age, | 3326 |
| Crime against nature, | 3327 |
| Fornication and adultery, | 3328 |
| Incest between certain near relatives, | 3329 |
| Incest between uncle and niece, etc., | 3330 |
| Lewd women within three miles of college, | 3331 |
| Seduction, | 3332 |
| VIII. DOMESTIC RELATIONS, | 3333—3350 |
| Abandonment of family by husband, | 3333 |
| Abandonment, evidence of, | 3334 |
| Abandonment, failing to support family, | 3335 |
| Abduction of children, | 3336 |
| Abduction, conspiracy for, | 3337 |
| Abduction of married women, | 3338 |
| Bigamy, | 3339 |
| Marriage with female under fourteen, | 3340 |
| Miscegenation, | 3341 |
| Miscegenation; register of deeds, minister; justice, | 3342 |
| Marriage license; obtaining by false representation, | 3343 |
| Marriage ceremony; performing without license, | 3344 |
| Procuring possession of child unlawfully, | 3345 |
| Hiring another's servant, | 3346 |
| Enticing servant to leave master, | 3347 |
| Children under twelve not worked in factories, | 3348 |
| Children under eighteen, hours of labor regulated, | 3349 |
| Children, parents misstating age of, | 3350 |
| IX. DRAINAGE, | 3351—3358 |
| Canal dug under parol agreement, unlawful to obstruct same, | 3351 |
| Drain cut by consent, obstructing, | 3352 |
| Draining creeks, refusal to comply with order of board, | 3353 |
| Draining lowlands, refusal to act as commissioner, | 3354 |
| Drains, obstructing, when necessary for mining, | 3355 |
| Drainways, protection of, in certain counties, | 3356 |
| Sawdust in streams, | 3357 |
| Streams; failure of owner of dam to keep gates, etc., | 3358 |
| X. ELECTIONS, | 3359—3377 |
| Betting on, | 3359 |
| Breaking up; disturbing officers, | 3360 |
| Bribery of voters, | 3361 |
| Discharging employee on account of vote, | 3362 |
| Felon voting, | 3363 |
| Liquor, giving away at, | 3364 |
| Oath, corruptly taking, | 3365 |
| Officer failing to discharge duty, | 3366 |
| Permanent registration; taking false oath, | 3367 |
| Permanent registration, officer failing to discharge duty, | 3368 |
| Registering or voting at more than one box, | 3369 |
| Registering unlawfully, | 3370 |
| Returns, failure to make, | 3371 |
| Returns, making false, | 3372 |
| Returns, copy of; refusal, | 3373 |
| Removal, officer acting after, | 3374 |
| Taxes, sheriff to furnish list of, | 3375 |
| Taxation, false certificate of exemption from, | 3376 |
| Tax receipt given without payment, | 3377 |
| XI. EMBEZZLEMENT, | 3378—3385 |
| By railroad officers, | 3378 |
| Conspiracy for, | 3379 |

CAPTIONS.

CRIMES—Continued.

| | Sections. |
|--|-----------|
| Partner, surviving, converting assets, | 3380 |
| Property in possession by virtue of office or employment, | 3381 |
| State's bonds and securities by officer, | 3382 |
| Trust funds by officers, | 3383 |
| Treasurer of benevolent society, | 3384 |
| Taxes, | 3385 |
| XII. FENCES, | 3386—3388 |
| Removal of common, | 3386 |
| In stock law territory, | 3387 |
| Wire, destroying, | 3388 |
| XIII. FISHING, | 3389—3393 |
| Fisheries, injury to, | 3389 |
| Injuring platforms erected for, | 3390 |
| In Cape Fear, by nonresidents, | 3391 |
| Poisoning streams to kill fish, | 3392 |
| Trout, catching with seines, shooting, | 3393 |
| XIV. FORGERY, | 3394—3402 |
| Bank note, check, etc., | 3394 |
| Bank notes, connecting different parts of, | 3395 |
| Certificates of stock by officer of corporation, | 3396 |
| Counterfeiting coin, | 3397 |
| Counterfeiting, possession of tools for, | 3398 |
| Deeds and other papers, | 3399 |
| Judgments, securities, etc., selling same, | 3400 |
| Names to petitions; using such petitions, | 3401 |
| Uttering forged paper, | 3402 |
| XV. FRAUDS, | 3403—3411 |
| Blackmailing, | 3403 |
| Fairs, fraudulent entry of horses at, | 3404 |
| False lights on seashore, | 3405 |
| False pretense; obtaining advances under promise to work, | 3406 |
| False pretense; cheating by, | 3407 |
| False pretense; obtaining signature by, | 3408 |
| False pretense; obtaining advances by, | 3409 |
| Mortgaged property, disposing of; indictment; proof, | 3410 |
| Secreting property to hinder enforcement of lien, | 3411 |
| XVI. GOVERNMENT, | 3412—3414 |
| Rebellion against the state, | 3412 |
| Rebellion or insurrection, conspiracy for, | 3413 |
| Secret political societies, | 3414 |
| XVII. HEALTH, | 3415—3426 |
| Board of health to notify school committees of contagious diseases, | 3415 |
| Children exposed to contagious diseases not to attend schools, | 3416 |
| Householder failing to give notice of contagious disease, | 3417 |
| Physician and county superintendent to give notice of contagious diseases, | 3418 |
| Quarantine regulations, | 3419 |
| Quarantine regulations, Cape Fear river, | 3419a |
| Quarantine regulations; vessels, | 3419b |
| Rules of sanitary committee, | 3420 |
| Travelers coming from infected places, | 3421 |
| Food misbranded or adulterated, | 3422 |
| Foods; refusal to furnish samples for analysis, | 3422a |
| Nuisance, failure to abate, | 3422b |
| Obstructing inspector in performance of duty, | 3423 |
| Refusal to sell sample of food, | 3424 |
| Vaccination, rules in regard to, | 3424a |
| Water supply, damage to, | 3425 |

CAPTIONS.

| CRIMES—Continued. | Sections. |
|---|-----------|
| Water supply, damage to, | 3425a |
| Water supply of public institutions, | 3426 |
| XVIII. HUNTING, | 3427—3445 |
| Hunting on land of another, | 3427 |
| Netting quail in certain counties, | 3428 |
| Hunting wild fowl with fire. | 3429 |
| Hunting before daylight and after sunset, | 3430 |
| Nonresidents hunting without license, | 3431 |
| Killing game out of season, | 3432 |
| Destroying nests or eggs of birds, | 3433 |
| Shipping certain birds, | 3434 |
| Packages of game to be marked, | 3435 |
| Wild fowl in Panlico sound, Hyde county, | 3436 |
| Wild fowl in New Hanover and Brunswick counties, | 3437 |
| Wild fowl, Currituck county, | 3438 |
| Hunting wild fowl in Dare county without license. | 3439 |
| Wild fowl in Dare county, | 3441 |
| Wild fowl, Carteret county, | 3442 |
| Chasing deer with dogs, certain counties. | 3443 |
| Hunting deer by firelight, | 3444 |
| Hunting by firelight, evidence of accomplices, | 3445 |
| XIX. INSURANCE, | 3446—3459 |
| Adjuster acting for unauthorized company, | 3446 |
| Agent procuring insurance in unauthorized company, and failing to file statement and affidavit, | 3447 |
| Agent acting without license, | 3448 |
| Agent to exhibit license, | 3449 |
| Agent obtaining premiums by false representations, | 3450 |
| Agents, etc., making false statements, | 3451 |
| Agents signing certain blank policies, | 3452 |
| Agent guilty of larceny, | 3453 |
| Agent violating insurance law, | 3454 |
| Company advertising assets without liabilities, | 3455 |
| Company making false statement, | 3456 |
| Failure to exhibit books on demand, | 3456a |
| Fire company reinsuring in unauthorized company, | 3457 |
| Fire mutual, guaranteeing against assessments, | 3458 |
| Reinsurance; medical examination. | 3459 |
| XX. LARCENY, | 3460—3472 |
| Bank notes, securities, etc., | 3460 |
| By servant, | 3461 |
| Of horse, | 3462 |
| Temporary use of horse, | 3463 |
| Live stock, felonious injury equal to, | 3464 |
| Dogs subject of larceny, | 3465 |
| Growing crops, | 3466 |
| Wood or other property on land, | 3467 |
| Records, registration books; indictment for, | 3468 |
| Wills, | 3469 |
| Receiving, | 3470 |
| Punishment for, | 3471 |
| Distinction between grand and petit, abolished, | 3472 |
| XXI. LIQUORS, | 3473—3493 |
| Adulteration of, | 3473 |
| Manufacturing or selling poisonous, | 3474 |
| Adulteration of, selling recipe for, | 3475 |
| Furnishing to inmates of institutions, | 3476 |
| Political speaking, sale within two miles of, | 3477 |
| Minors, selling to, | 3478 |
| Minors, selling to; exemplary damages, | 3479 |

CAPTIONS.

CRIMES—Continued.

| | Sections. |
|--|-----------|
| Sunday, selling on, | 3480 |
| Local option territory, sale in, | 3481 |
| Local option territory, sale by druggist, | 3482 |
| Manufacture of, outside of towns, | 3484 |
| Sale of, outside of towns, | 3485 |
| Sale in towns without license, | 3486 |
| Physicians and druggists, | 3487 |
| Druggist failing to keep record of sales, | 3488 |
| Dispensary officer or employee violating rules, etc., | 3489 |
| Liquor selling in towns having dispensary, | 3490 |
| Drinking on, or refusing to leave dispensary premises, | 3491 |
| Manager of dispensary buying liquor without authority; adul- | |
| terating; making false entry on books, | 3492 |
| Wine, in what quantities, where drunk. | 3493 |
| XXII. NATIONAL GUARD, | 3494—3500 |
| Organizing company without authority, | 3494 |
| Placing name on muster roll wrongfully, | 3495 |
| Injuring military property, | 3496 |
| Member of national guard failing to return property of state, | 3497 |
| Refusing to deliver public arms to officer on demand, | 3498 |
| Selling public arms, | 3499 |
| Selling accoutrements, | 3500 |
| XXIII. NAVIGATION, | 3501—3520 |
| Artificial islands, erecting, | 3501 |
| Boats, tackle, etc., removing, | 3502 |
| Buoys, carelessly dragging from position, | 3503 |
| Buoys, beacons, etc., interfering with, | 3504 |
| Lighthouses, anchoring in range of, | 3505 |
| Lumbermen to remove obstructions in Albemarle sound, | 3506 |
| Seamen, enticing from vessel, | 3507 |
| Seamen, secreting or harboring, | 3508 |
| Seamen, search warrants for, | 3509 |
| Seamen; appeal and procedure thereon, | 3510 |
| Streams, obstructing, | 3511 |
| Streams navigable. obstructing; pilot failing to give informa- | |
| tion, | 3512 |
| Streams, obstructing passage of boats, | 3513 |
| Flats and barges removed from docks on order of harbor- | |
| master, | 3514 |
| Encumbering docks of Wilmington, | 3515 |
| Obstructing harbor-master of Wilmington, | 3516 |
| Wrecks, commissioner of, violating law, | 3517 |
| Failure to report finding wrecked property, | 3518 |
| Violating chapter on wrecks, | 3519 |
| Obstructing waters of Currituck sound. | 3520 |
| XXIV. OFFICERS, | 3521—3560 |
| Acting without qualifying, | 3521 |
| Board of charities furnished information, | 3522 |
| Bodies for dissection, | 3523 |
| Bribery of, | 3524 |
| Bribe, offering to, | 3525 |
| Bribery of legislator, | 3526 |
| Buying and selling offices, | 3527 |
| Contracting for own benefit, | 3528 |
| County commissioners approving bond known to be insufficient, | 3529 |
| County commissioners not heating jail, | 3530 |
| Counties, cities, etc., speculation in claims against, | 3531 |
| Duty, failure to discharge, | 3532 |
| Treasurer of state, fraudulent entries and statements, | 3533 |
| Public laws, custodian of, etc., disposing of or refusing to de- | |
| liver to successor, | 3534 |

CAPTIONS.

CRIMES—*Continued.*

Sections.

| | | |
|-------|---|-----------|
| | failure to file report of fines, | 3535 |
| | Neglect of duty by commissioner, | 3536 |
| | Town officers failing to pay over taxes monthly, | 3537 |
| | Sheriff or other officer failing to return process, | 3538 |
| | Register of deeds failing to discharge duties, | 3539 |
| | Register of deeds, failure to index instruments, | 3540 |
| | Swearing falsely to report, | 3541 |
| | Officer, failure to discharge duties, | 3542 |
| | Officer failing to discharge duties in regard to pensions, | 3543 |
| | Officer failing to pay over fines, penalties, etc., | 3544 |
| | Sheriff failing to return venire facias, | 3545 |
| | Insolvent taxpayers, failure to publish list of, | 3546 |
| | Escape, officer indictable for, proof, | 3547 |
| | Habeas corpus; recommitting one discharged thereon, | 3548 |
| | Habeas corpus, false return to writ, | 3549 |
| | Habeas corpus, concealing party entitled to, | 3550 |
| | Penalty for failing to make, or for refusing copy of commitment, | 3551 |
| | Homestead, failure to allot, | 3552 |
| | Homestead; officers, appraisers and debtor conspiring, | 3553 |
| | Homestead; officers, appraisers and creditors conspiring, | 3554 |
| | Nonresident insane person, justice or clerk knowingly committing, | 3555 |
| | Justice of the peace refusing to furnish bill of costs, | 3556 |
| | Justice of the peace acting after removal from township or before qualifying, | 3557 |
| | Ex-justice of the peace failing to turn over books and papers, | 3558 |
| | Officers ordering females to work in chain-gang, | 3559 |
| | Sheriff or jailer failing to obey commitment from adjoining county, | 3560 |
| XXV. | PERJURY, | 3561—3567 |
| | Perjury, | 3561 |
| | Subornation of, | 3562 |
| | Court-martial, | 3563 |
| | False oath to wrong a laborer, | 3564 |
| | Before legislative committee, | 3565 |
| | Insolvent debtor, | 3566 |
| | Trust for benefit of creditors; false oath, | 3567 |
| XXVI. | PERSON, | 3568—3590 |
| | Abortion; destroying child; intent, | 3568 |
| | Abortion; destroying woman; intent, | 3569 |
| | Assault, punishment for, | 3570 |
| | Assault in secret manner, | 3571 |
| | Assault, pointing gun, | 3572 |
| | Birth of child, concealing, | 3573 |
| | Carnal knowledge of married woman by personating husband, | 3574 |
| | Carnal knowledge of married woman, attempt, | 3575 |
| | Castration or maiming without malice aforethought, | 3576 |
| | Castration with malice, | 3577 |
| | Dueling; sending, accepting, bearing challenge, | 3578 |
| | Duel, death in; murder, | 3579 |
| | Homicide; murder in the first degree, second degree, | 3580 |
| | Homicide; manslaughter, | 3581 |
| | Homicide; manslaughter, second offense, | 3582 |
| | Kidnapping, | 3583 |
| | Libel, communicating to newspaper, | 3584 |
| | Maiming, | 3585 |
| | Rape, | 3586 |
| | Rape, assault with intent to commit, | 3587 |
| | Rape and buggery, proof, | 3588 |

CAPTIONS.

CRIMES—Continued.

| | Sections. |
|---|-----------|
| Slander of innocent woman, | 3589 |
| Enticing minors out of the state, | 3590 |
| XXVII. PROFESSIONS, | 3591—3600 |
| Clerks, justices, etc., practicing law, | 3591 |
| Dentistry, practicing without license, | 3592 |
| Dentistry, falsely claiming to hold license, | 3593 |
| Embalming without license, | 3594 |
| Medicine, practicing, without license, | 3595 |
| Medicine, practicing, without registering, | 3596 |
| Medicine, clerk of superior court registering doctor of, illegally, | 3597 |
| Pharmacy; permitting clerk without license to compound pre- | |
| scriptions, | 3598 |
| Pharmacy, practicing, without displaying license, | 3599 |
| Poisons; sale regulated, | 3599a |
| Trained nurse, acting as, illegally, | 3600 |
| XXVIII. PRISONERS AND CONVICTS, | 3601—3606 |
| Breaking prison, | 3601 |
| Escape, | 3602 |
| Escape of, permitting or maltreating, | 3603 |
| In improper apartments, | 3604 |
| Injury to, by jailer, | 3605 |
| Messages and weapons, conveying to, | 3606 |
| XXIX. PROPERTY, | 3607—3633 |
| Contractor failing to furnish owner indebtedness for labor and | |
| materials, | 3607 |
| Crop, tenant's seized by landlord, | 3608 |
| Crop, removal of, by tenant, | 3609 |
| Engines, boilers, machinery, tampering with, | 3610 |
| Fairs, injuring exhibits; indictment, | 3611 |
| Fair grounds, unlawful entering, | 3611a |
| Gas company; injuring machinery, fixtures, etc., | 3612 |
| Electric and steam appliances protected, | 3613 |
| Forcible entry and detainer, | 3614 |
| Houses, churches, fences, walls, injuries to, | 3615 |
| Landmarks, altering or removing, | 3616 |
| Live stock, shipping, on Scuppernon river, | 3617 |
| Malicious injury to personal property, | 3618 |
| Malicious injury to real property, | 3619 |
| Milldams, injuries to, | 3620 |
| Mills, false toll-dishes, | 3621 |
| Monuments and tombstones, defacing or removing, | 3622 |
| Moving enclosures of graveyards, | 3623 |
| Graves, disturbing, | 3624 |
| Surveyor's chains tested, | 3625 |
| Possession, surrendering, to other than landlord, | 3626 |
| Taking unlawful possession of another's house, | 3627 |
| Tenant injuring houses, fences, trees, etc., | 3628 |
| Timber, cutting or removing from land of another, | 3629 |
| Trespass on land after being forbidden; license to look for | |
| estrays, | 3630 |
| Trustee in deed of trust for creditors violating duty, | 3631 |
| Cheating minors, | 3632 |
| Removing dog-tongue, etc., in certain counties, | 3633 |
| XXX. PUBLIC JUSTICE, | 3634—3643 |
| Corporations, agents of, refusing certain demands by officer | |
| with execution for service, | 3634 |
| Corporation commission, witnesses before, | 3635 |
| General assembly, failure to attend as witness before com- | |
| mittee of, | 3636 |
| Internal improvements, witnesses before board, | 3637 |

CAPTIONS.

CRIMES—Continued.

| | Sections. |
|---|------------|
| Insane person, aiding to escape from hospital, | 3638 |
| Insane; violation of ordinance of hospital, | 3639 |
| Jurors and witnesses, intimidating, | 3640 |
| Jurors, bribery of, | 3641 |
| Lynching, | 3642 |
| Lynching; witness refusing to appear and testify, | 3643 |
| Officers, resisting, | 3644 |
| Officer, refusing to aid, in arrest, | 3645 |
| Town ordinance, violation of, | 3646 |
| XXXI. PUBLIC PEACE, | 3647—3653 |
| Armed men in bodies as detectives, | 3647 |
| Disturbing certain meetings, | 3648 |
| Disturbing religious assembly by certain exhibitions, | 3649 |
| Disturbing religious congregation, | 3650 |
| Prize-fighting, engaging in, betting on, aiding and abetting, | 3651 |
| Prize fight, duty of governor to prevent, | 3652 |
| Weapons, carrying concealed, | 3653 |
| XXXII. PUBLIC POLICE, | 3654—3688d |
| Advertisements, injury to, | 3654 |
| Advertisements, defacing, | 3655 |
| Bills, etc., unauthorized, passing as money, | 3656 |
| Bills, etc., unauthorized, issued to circulate as money, | 3657 |
| Ginseng, digging between April and September, | 3659 |
| Gambling, | 3660 |
| Gambling, allowing, in house where liquor sold, duty of police officers; penalty, | 3661 |
| Gambling, faro-banks and tables, | 3662 |
| Gaming tables, betting thereat, | 3663 |
| Gaming tables, allowing on premises, | 3664 |
| Gaming tables destroyed by justices, | 3665 |
| Gambling; justices and other officers to summon witnesses, | 3666 |
| Gambling, money to be seized, | 3667 |
| Gaming tables, opposing destruction of, | 3668 |
| Lotteries, advertising, | 3669 |
| Lotteries, | 3670 |
| Lottery tickets, sale of, | 3671 |
| Letters, wrongfully opening and reading, | 3672 |
| Nontransferable script to laborers, | 3673 |
| Obscene literature, | 3674 |
| Pension claims, speculating in, | 3675 |
| Public drunkenness, | 3676 |
| Tramps, who are; discharged how, | 3677 |
| Tramp entering dwelling without consent, | 3678 |
| Tramp maliciously injuring person or property, | 3679 |
| Tramp, arrest of, | 3680 |
| Vagrancy, | 3681 |
| Trusts and monopolies, | 3682 |
| Exposing children to fire, | 3683 |
| Disposing of cigarettes to minors, | 3684 |
| Minor going in barroom, etc., | 3685 |
| Aiding minor to obtain cigarettes, | 3686 |
| Selling certain weapons to a minor, | 3687 |
| Shooting rifles across Currituck sound, | 3688 |
| Commercial feeding stuffs, | 3688a |
| Crop pests; preventing inspection, | 3688b |
| Fertilizers, sale of, | 3688c |
| Insects, ravages of, | 3688d |
| XXXIII. PUBLIC PROPERTY, | 3689—3694 |
| Meridian monument, injuring, or failing to discharge duty in reference thereto, | 3689 |

CAPTIONS.

CRIMES—Continued.

| | Sections. |
|--|-----------|
| Phosphate rock in rivers, | 3690 |
| Disorderly conduct in public buildings, | 3691 |
| Public grounds of state in Raleigh, | 3692 |
| Trespass on public lands, | 3693 |
| Cutting timber on lands before obtaining a grant, | 3694 |
| XXXIV. RAILROADS, | 3695—3716 |
| Unauthorized railroads, | 3695 |
| Discrimination in charges, | 3696 |
| Unreasonable rates, | 3697 |
| Discriminating against Atlantic and North Carolina Railroad, | 3698 |
| Discrimination against connecting lines, | 3699 |
| Cattle killed in certain counties, | 3700 |
| To construct cattle guards and crossings, | 3701 |
| Pooling freights, | 3702 |
| Officers failing to turn over property to successors, | 3703 |
| Arrangement of cars, | 3704 |
| Engineer, conductor, brakeman intoxicated, | 3705 |
| Injuring or obstructing, | 3706 |
| Injuries to, without malice, | 3707 |
| Injuries to property, | 3708 |
| Beating way on trains, | 3709 |
| Entering cars after forbidden, | 3710 |
| Passengers with second-class tickets riding in first-class cars, | 3711 |
| Intoxicated person entering train, | 3712 |
| Train robbery, | 3713 |
| Train robbery, attempt, | 3714 |
| Shooting or throwing at cars, | 3715 |
| Tickets, unlawful sale of, | 3716 |
| XXXV. ROADS AND BRIDGES, | 3717—3733 |
| Bridges, injuring, | 3717 |
| Bridges, failure to repair, | 3718 |
| Bridges, failure to maintain, | 3719 |
| Bridges, vessels not fastened to, | 3720 |
| Bridges, failure of railroads, etc., to keep up, | 3721 |
| Barbed wire fences along, | 3722 |
| Board of supervisors failing to make reports, | 3722a |
| Churches, way to, | 3723 |
| Damage to roads by hauling logs, how paid, | 3724 |
| Damage to road by hauling logs or wood, | 3725 |
| Failure to work, | 3726 |
| Gates across public roads, leaving open, | 3727 |
| Gates across, injury to, | 3728 |
| High-water signals established, | 3729 |
| Injury to sign-boards or mile-posts, | 3730 |
| Obstruction of roads, | 3731 |
| Overseer; neglect of duty, | 3732 |
| Fast driving over bridges, | 3733 |
| XXXVI. REVENUE, | 3734—3740 |
| Agent of corporation failing to pay taxes, | 3734 |
| License tax, failure to pay, | 3735 |
| Officer failing to surrender tax list, | 3736 |
| Sheriff failing to attend tax sale; selling property not liable, | 3737 |
| Tax commissioners may examine books, | 3738 |
| Peddling without a license, | 3739 |
| Stevedores to obtain license, | 3740 |
| XXXVII. SAFETY, | 3741—3745 |
| Dynamite cartridges, exploding, | 3741 |
| Marl beds, failure to enclose, | 3742 |
| Mines, | 3743 |

CAPTIONS.

CRIMES—Continued.

| | Sections. |
|--|-----------|
| Street cars to have vestibule fronts, | 3744 |
| Street cars to have fenders, | 3745 |
| XXXVIII. SALES, | 3746—3767 |
| Butchers to keep record, | 3746 |
| Corn, sale of, in certain counties, | 3747 |
| Cotton in seed, sale of, | 3748 |
| Cotton, inspection and sale of, in certain counties, | 3749 |
| Cotton, sale of, at night, | 3750 |
| Cotton, weighing of, | 3751 |
| Cotton weigher failing to file oath, | 3752 |
| Cotton-seed meal, sale of, not having been inspected, | 3754 |
| Obstructing inspector of concentrated feeding stuff in duties, | 3755 |
| Selling concentrated feeding stuff, taxes not paid, | 3756 |
| Dynamite, selling without a license, | 3757 |
| Fertilizers; officers and agents of transportation companies to furnish information, | 3758 |
| Fertilizers containing matter not available as plant food, | 3759 |
| Fertilizers; removal or sale of, after condemned, | 3760 |
| Fertilizers, sale of, without tags, | 3761 |
| Future delivery contracts, | 3762 |
| Future delivery; contract made in another state, | 3763 |
| Oleomargarine sold without label, | 3764 |
| Spirits turpentine, adulteration of, | 3765 |
| Warehouse, unlawfully disposing of property stored in public, | 3766 |
| XXXIX. SCHOOLS, | 3767—3774 |
| Agents for sale of supplies not to be officers, | 3767 |
| Books, selling at greater than contract price, | 3768 |
| Buying supplies from interested officer, | 3769 |
| Census returns, false, | 3770 |
| Duty, failure of officer to discharge, | 3771 |
| Disturbing, | 3772 |
| Treasurer failing to report, | 3773 |
| Witness failing to appear and testify, | 3774 |
| XL. SUNDAY, | 3775—3779 |
| Hunting wild fowl on Sunday, and at night, | 3775 |
| Sunday, fishing with nets on, | 3777 |
| Sunday, hunting on, | 3778 |
| Running trains on, | 3779 |
| XLI. TELEGRAPH AND TELEPHONE, | 3780—3784 |
| Lines, interfering with, | 3780 |
| Message; obtaining knowledge of contents, | 3781 |
| Telephone message, obtaining knowledge of, | 3782 |
| Poles and wires, injury to, | 3783 |
| Trees felling, on wires, | 3784 |
| XLII. TRADEMARKS, | 3785—3791 |
| Forgery and counterfeiting; selling goods with counterfeit marks, | 3785 |
| Forgery and counterfeiting; fraudulent use of brands, | 3786 |
| Private marks, stamps, labels, | 3787 |
| Larceny of branded timber, | 3788 |
| Timber trademark, use of, | 3789 |
| Timber mark, altering, | 3790 |
| Timber mark, taking possession of logs bearing, | 3791 |
| XLIII. WATERSHEDS, | 3792—3797 |
| Inspection of, | 3792 |
| Disobeying instructions, | 3793 |
| Polluting, | 3794 |
| Depositing human excreta on, | 3795 |
| Discharging sewerage into certain streams, | 3796 |
| Failure to provide system for protection of watershed, | 3797 |



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